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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 330.

EUGENE KESSLER, District Director of Immigration and Naturalization,

Petitioner,

v.

JOSEPH GEORGE STRECKER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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Opinions Below.

The United States District Court for the Eastern District of Louisiana denied the respondent's petition for a writ of habeas corpus without opinion (R. 65). The opin-

ion of the Circuit Court of Appeals (R. 71-74) reversing the judgment of the District Court is reported in 95 F. (2d) 976. The *per curiam* opinion of the Circuit Court of Appeals amending the judgment of reversal and denying petitioner's motion for rehearing and the dissenting opinion of Judge Sibley (R. 77-78) are reported in 96 F. (2d) 1020. Petitioner's further motion to set aside the amended judgment and grant a rehearing was denied without opinion (R. 83).

Jurisdiction.

The original judgment of the Circuit Court of Appeals was entered April 6, 1938 (R. 74). An order denying a petition for rehearing (R. 74-76) was entered June 7, 1938 (R. 79), and on the same day an order was entered amending the judgment (R. 79). An order denying a second petition for rehearing and to set aside the judgment as amended, filed June 27, 1938 (R. 80-81), was entered July 27, 1938 (R. 83). The petition for writ of certiorari was filed September 7, 1938, and was granted October 17, 1938 (R. 84). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

(1) Whether there is sufficient evidence in the record to sustain the finding in the warrant of deportation that respondent, after entry, became a member of an organization that, within the meaning of the statute, believes in, advises, advocates or teaches the overthrow by force and violence of the Government of the United States.

(2) Whether Section 2 of the Act of October 16, 1918 authorizes the deportation of an alien for membership in an organization which would warrant exclusion under Section 1, where his membership occurred after entry, but terminated substantially before the institution of deportation proceedings.

(3) Whether the question of the sufficiency of the evidence to sustain the finding in the warrant of deportation that respondent personally "believes in and teaches" the violent overthrow of the Government of the United States should be considered when that question was not presented by the petition for certiorari and, if it is to be considered, whether the Court below correctly held that the evidence is insufficient to sustain that finding.

Statutes Involved.

Section 2 of the Act of October 16, 1918, c. 186, 40 Stat. 1012 (U. S. C., Title 8, Sec. 137 [g]), provides—

> That any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the Immigration Act of February fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States.

Section 1 of the Act of October 16, 1918, *supra*, as amended by the Act of June 5, 1920, c. 251, 41 Stat. 1008, 1009 (U. S. C., Title 8, Sec. 137 [c]), so far as pertinent, provides—

That the following aliens shall be excluded from admission into the United States:

* * * * * *

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States * * *;

* * * * * *

Section 19 of the Immigration Act of 1917, c. 29, 39 Stat. 874, 890 (U. S. C., Title 8, Sec. 155), provides in part:

* * * In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.

The relevant statutory provisions are more fully set out in Appendix A, pages 62-79, of the Government's brief.

Statement.

The record, which contains an agreed statement (R. 4-7) and accompanying exhibits (R. 7-65) establishes the following facts:

Respondent is an alien who entered the United States legally in 1912 as an immigrant from Austria destined for the coal fields of Pennsylvania (R. 4, 31). He has resided here continuously since his entry, Hot Springs, Arkansas, having been his home for the last twenty years (R. 39). For some years prior to 1925 he worked in various restaurants as an employee and then he opened his own restaurant which he operated for over five years. Since 1930 he has "not been employed on account of poor health"

(R. 39). But in 1932 he purchased the house in which he lives (R. 40) and rents rooms (R. 10). He owned other property as well, including a farm, some mortgages and some stocks and bonds (R. 32, 53). He seems to have been regarded generally as a man of benevolent disposition (R. 25, 61) and his reputation in his community was good (R. 28, 48, 50, 51, 52, 58, 60, 62, 63). He became a member of the Communist Party in November, 1932, apparently paid 40 cents as membership dues and, concededly, ceased to be a member early in 1933 (R. 42, Government's brief, p. 8, Footnote 1).

In 1933 respondent filed a petition for naturalization (R. 4). On September 16, in the course of a hearing before the Acting District Director of Naturalization he stated that he had "joined the Communist Party" the previous November, under circumstances which he described (R. 42), that he had two months before the hearing bought bonds of the Soviet Union of the value of $1,588, which "are paying interest in gold dollars American money," and that for about nine months he had been receiving "The Communist Paper known as the Daily Worker"—sent to him by a former roomer who had left owing him $10 rent (R. 43). In conclusion, he said:

> "I do not consider myself a Communist, because I am not paying dues to the Communist Party. I do not know whether we shall ever have a Communistic system in the United States. I have read Marx's books and Marx states that sooner or later there will be a Red Government in every country in the world. I am trying to protect myself, and that is why I bought the bonds of the Russian Government. I do not know what is going to happen; I do not know how long I am going to live. * * * If Communism comes in this country I will not be against it, because I have got to go with the people, and whatever the people want I will have to go along with them." (R. 43-44)

Shortly thereafter respondent was taken before an Immigration Inspector in the office of the Hot Springs Chief of Police (R. 30)—apparently in the jail (R. 6-7)—and, in the presence of two local police officers was asked for a statement relative to his "right to be and remain in the United States" (R. 30). The detailed accuracy of the report of his statement (which had concededly been edited by the Immigration Officer in transcription, R. 6) was later denied by respondent who claimed that he was "excited and intimidated" (R. 10, 6). For the most part, however, he merely repeated what he had said at the naturalization hearing.

Thereafter, on November 25, 1933, a warrant of arrest issued under the hand of the Second Assistant Secretary of Labor charging that respondent is a deportable alien under the Act of October 16, 1918, as amended by the Act of June 5, 1920, for the reasons, in substance, that he believes in, advises, advocates or teaches the overthrow of the Government of the United States by force or violence, that he is a member of an organization that so believes, advises or teaches, that he is a member of an organization that distributes and has in its possession for distribution written or printed matter so advocating, and that, after his entry he has been found to have become a member of a class of aliens excluded by Section 1 of the statute, to wit, an alien who is a member of or affiliated with an organization so believing, advising or teaching (R. 7-8).

The respondent was accorded a hearing under this warrant on January 23, 1934. The record of this hearing (R. 5, 8-30) consists of the respondent's testimony, a transcript of the two statements purported to have been made by him prior to the issuance of the warrant, his membership book in the Communist Party of the United States (R. 34-38) and the testimony of two witnesses, one of them a character witness called by respondent. The Immigration Inspector concluded (R. 29-30) that the evidence sustained

the charges in the warrant of arrest and recommended deportation.

A second hearing was held in May, 1934 (R. 5, 44), before a different inspector who stated to respondent: "You are advised that the Bureau of Immigration and Naturalization of Washington has ordered that the case be re-opened for the purpose of introducing into the records of International or other authorities (*sic*) sufficient exhibits of literature of the Communist Party to show that the Party advocates the overthrow by force or violence the (*sic*) United States Government or other forms of organized government. You are advised that the Government will introduce a copy of The Communist dated April, 1934, Eighth Convention Issue, a magazine of the Theory and Practice of Marxism-Leninism, published monthly by the Communist Party of the United States of America." Thereupon, without authentication of any kind, seven short extracts from this magazine were offered in evidence (R. 5, 45-8). The respondent testified again at this hearing (R. 53-57) and, among other things, asserted, without contradiction, that he had never seen or heard of "The Communist" (R. 55-6). Many character witnesses also gave evidence as to respondent's good reputation in his community (R. 48-53, 57-64). The hearing concluded with the alien's declaration of his desire to remain in the United States "as this is where I made my money, where I want to spend it and where I want to die and I want no other country but the United States" (R. 64).

The order of deportation was founded on this evidence, the agreed statement explicitly reciting (R. 7) that "The Government exhibits introduced here constitute the record on which the order of deportation is based." The warrant (R. 64-65) signed by Turner W. Battle, Assistant to the Secretary of Labor, purports to be based upon "proofs submitted to me, Assistant to the Secretary, after due hearing before an authorized immigrant inspector" and makes the following findings with respect to respondent:

(1) "that he believes in and teaches the overthrow by force and violence of the Government of the United States";

(2) "that he is a member of an organization, association, society or group that believes in, advises, advocates and teaches the overthrow by force and violence of the Government of the United States";

(3) "that he is a member of an organization, association, society or group that writes, publishes and circulates written or printed matter advising, advocating and teaching the overthrow by force and violence of the Government of the United States";

(4) "that after entry he became a member of one or more of the classes of aliens enumerated in Section 1 of the aforementioned Act, as amended, to wit: aliens who are members of an organization, association, society or group that believes in, advocates and teaches the overthrow by force and violence of the Government of the United States."

On June 16, 1937, respondent filed the present petition for habeas corpus alleging that the warrant of deportation is void for a number of reasons among which are that "there is no evidence in the record of the Labor Department to sustain the finding contained in the warrant of deportation," that the Department "has not correctly construed the Immigration laws and rules," that "the alien has not been accorded a fair hearing by the Labor Department" and that he "has been denied due process of law" (R. 2). The writ issued. Petitioner's answer (R. 2-4) alleged that the order of deportation was issued on the basis of "complete reports" of the two hearings which were forwarded to the Secretary of Labor, that the order

is "based upon substantial evidence taken at the hearings above referred to," and that the hearings were "in accordance with the law." The answer further alleged that respondent "is an alien who believes in, advises, advocates, and teaches, and who is a member of and affiliated with an organization that believes in, advises, advocates and teaches the overthrow by force and violence of the Government of the United States" (R. 3-4).

Judge Borah denied the application and remanded respondent to custody (R. 7, 65). The Circuit Court of Appeals reversed (R. 74), holding, in the language of the opinion by Judge Hutcheson: "We find nothing essentially unfair about the hearings; as deportation hearings go, they were conducted with ordinary fairness. We agree with appellant, however, that the purported finding that he believes in and teaches, and belongs to or did belong to, an organization which believes in and teaches the overthrow by force and violence of the Government of the United States, is without any support in the evidence, is a mere fiating. The proceedings as a whole, and the questioning and summary in particular, are dramatic illustrations of the tyranny of labels over certain types of mind" (R. 71). Judge Holmes concurred in the result.

The order remanding the cause for further proceedings not inconsistent with the opinion (R. 74) was subsequently amended to read: "Reversed, with directions to try the issues de novo as suggested in Ex Parte Fierstein, 41 Fed. (2d) p. 54" (R. 77). Judge Sibley dissented both to the amendment of the judgment and to the denial of the Government's petition for rehearing. His opinion expressed the view that "a rehearing should be granted, especially to consider the significance of the references to the Third Communist International contained in the membership book issued to Strecker by the Communist Party of the U. S. A. and the question whether the objectives and programs of the two named organizations can be judi-

cially noticed. Neither of these things was argued before us nor considered in deciding the case, and they might lead to a different result" (R. 77).

The Government petitioned for certiorari to review the question whether "the court below erred in failing to sustain an order of deportation against respondent, an alien who in 1932 became a member of the Communist Party of the United States," alleging that the decision on that issue below conflicted with decisions in other circuits. The Circuit Court of Appeals was said to have erred in holding that an alien is not deportable by reason of the fact that he joined the Communist Party in 1932, in holding that the evidence before the Secretary of Labor concerning the principles of the Communist Party was insufficient to sustain the order of deportation, in remanding the case for a trial *de novo* in the District Court. No other specification was included in the errors to be urged, except the general charge of error in "failing to affirm the judgment of the District Court."

In this Court, as in the courts below, the Government makes no effort to sustain the second and third findings in the warrant of deportation (*supra*, p. 8)—that respondent at the time of the proceedings brought against him was a member of an organization proscribed by the statute. The Government's brief concedes that there was no such evidence (p. 8, n. 1). It is argued however that the evidence that respondent joined the Communist Party in 1932 and was a member for several months and the evidence as to the character of that party suffice to sustain the finding that after entry respondent became a member of an organization that believes in, advocates and teaches the overthrow by force and violence of the Government of the United States, within the meaning of the statute; that the statute does not conflict with the First Amendment to the Constitution of the United States even if construed to apply to an organization which teaches violent overthrow

of the government at some remote future time; that under Section 2 of the Act of October 16, 1918, c. 186 (40 Stat. 1012, 8 U. S. C., §137 [g]) an alien is deportable even though he is not a member of a proscribed organization, if he was a member at any time after his entry. Although conceding that the point was not presented by the petition for certiorari or included in the specification of errors to be urged, the Government also contends that there was some evidence to support the finding in the deportation warrant that respondent personally believes in and teaches the forcible overthrow of the Government and that the order of deportation can be sustained on that ground. Finally, it is argued that the Court of Appeals erred in remanding the cause for trial *de novo* in the District Court.

Summary of Argument.

I

The evidence in the record is insufficient to sustain the finding in the warrant of deportation that the Communist Party, during respondent's brief membership, is an organization which believes in, advises, advocates or teaches the overthrow by force and violence of the Government of the United States. The evidence as to the activities of the Party shows merely that during the campaign of 1932 it urged support for Communist candidates. The documentary evidence in the record does not show advocacy of violent revolution by the Communist Party. Respondent's membership book contained the same statements which, in *Herndon* v. *Lowry*, 301 U. S. 242, 249-50, this Court viewed as innocent. The extracts from "The Communist" are unauthenticated and irrelevant, but even if they are considered they cannot be regarded as evidence of a policy of violence in the United States by the Communist Party.

The Court cannot properly consider documents not in

the record, referred to here for the first time by the Government. It appears affirmatively that they were not considered by the Immigration authorities. They are not properly within the field of judicial notice but, even if they could be noticed, there is much other matter which would have to be considered to determine their true meaning and significance. Review must be limited to the evidence in the record.

The finding in the warrant as to the nature of the Communist Party cannot be sustained unless based upon substantial evidence. There is no such evidence, nor does the Government seek to sustain the finding if the evidence to sustain it must be of that character.

The statute, properly construed, applies only to one who is a member of an organization advocating the use of force or violence presently or at some reasonably proximate future time and not in the hypothetical or remote future. The finding in the warrant cannot be sustained if this construction is correct. This construction is required by a consideration of its legislative history, which shows that it was aimed at threats of immediate violence, and not at dangers almost wholly imaginary. This construction should be adopted, furthermore, because a construction which would apply it to membership in an organization advocating the use of force, if at all, only in the very remote future, would raise serious questions as to its validity under the First Amendment. The assumption that friendly aliens are not entitled to the protection of the Bill of Rights is unwarranted by any decision of this Court. On the contrary, such aliens are protected by the First Amendment. The power of deportation, like other powers of Congress, is limited by the First Amendment, and a construction of the statute to permit deportation for membership in an organization not advocating the use of force immediately or in the reasonably near future, would render the statute invalid. Even were the power of deportation

not limited by the First Amendment, in construing the statute, it should be assumed that Congress did not intend to do violence to the spirit of that Amendment.

II

Even if it be assumed, contrary to the fact, that the Communist Party was, at the time of respondent's membership, an organization advocating the overthrow of the Government by force or violence within the meaning of the statute, the statute does not authorize deportation of one who had ceased to be a member substantially before commencement of deportation proceedings. The class deportable is defined in the statute in terms which, grammatically, can apply only to present members. The view that the statute does not apply to past membership is supported by a consideration of its legislative history, and there is no contrary administrative construction. Furthermore, the nature of the process of deportation points to the inapplicability of the statute to a former member of a proscribed organization. The deportation laws are not criminal laws, but provisions for the elimination of dangerous individuals. It is not to be supposed that Congress intended to eliminate as well those who had ceased to be dangerous. Indeed, a construction of the statute to apply to those converted from membership would tend to prevent conversion and increase the danger which the statute was designed to prevent.

III

As the question of the sufficiency of the evidence to sustain the finding in the warrant that respondent personally "believes in and teaches" the violent overthrow of the Government of the United States, was not presented in the

petition for certiorari, it should not be considered. But if the Court considers the question, it is clear that the finding cannot be sustained. Nor would the evidence sustain a finding as to respondent's belief alone. Indeed, if the statute were construed to apply merely to respondent's personal belief, such a construction would open here the question of the validity of the statute as so construed under the First Amendment and it would be invalid.

ARGUMENT.

I.

There is insufficient evidence in the record to sustain the finding in the warrant of deportation that respondent after entry became a member of an organization that, within the meaning of the statute, believes in, advises, advocates or teaches the overthrow by force and violence of the Government of the United States.

The fact that respondent admittedly joined the Communist Party of the United States in November, 1932 and remained a member for several months does not support the finding that he became a member of an organization "that believes in, advises, advocates and teaches the overthrow by force and violence of the Government of the United States." The evidence was insufficient to sustain a finding that the Communist Party is an organization of that sort.

The only evidence in the record as to the *activities* of the Communist Party either while respondent was a member or at any time consists of respondent's testimony that a day before the presidential election of November, 1932 it held a meeting in a Negro church in Hot Springs, which he attended and at which he joined (R. 15, 42), that he did not know it was a Communist meeting until after he went

the church (R. 14), that there were three speakers, two
n and a woman (R. 12), that none of the speeches ad-
cated the overthrow of the Government of the United
ates, that, on the contrary, they "advocated the organi-
ion of a Communist Party so everybody could have bread
d butter," that one of the speakers, a Negro, said that
he milk of a negro woman's breast was good for a white
ld to feed on," that he was given a handfull of circulars
the meeting (R. 13), that they contained such political
hortation as "Vote Communist on the November Plank"
. 15), that at the meeting they "just talked about big
dlords and that we had to do something about it, but
dn't say anything about the overthrow of any Govern-
nt," (R. 57) that other papers called upon the people
unite against capitalism (R. 33). This evidence obviously
es not warrant an inference that the Communist Party
s engaged in subversive activity and no such contention
made by the Government. All that is indicated is that
lor to the election in November, 1932, an effort was made
enlist support for the Communist candidates at the
lls.

To sustain the finding with respect to the nature of the
mmunist Party the Government points to statements in
spondent's membership book, introduced in evidence at
first deportation hearing (R. 34-38) and in "The Com-
nist," a magazine purporting to be published by the
rty, extracts from which were read into the record at
second hearing (R. 45-48). This evidence is patently
ufficient; when examined objectively, it is clear that the
rt below was correct in concluding that it does not re-
t advocacy by the Communist Party of the overthrow
the Government of the United States by force or violence.
The membership book refers to the Communist Party of
U. S. A. as a "Section of the Communist International."
sets forth a series of "Extracts from the statutes of
Communist Party of the U. S. A." dealing with the

qualifications of members, the structure of the party, dues, and the importance of party regularity and discipline, none of which has the remotest bearing on the present question. The concluding paragraphs of the booklet, entitled "What is the Communist Party?" and "On Discipline," quoted in the Government's brief (pp. 35-37) do not purport to be extracts from the statutes of the Party. The reference therein contained to the competence of the Party "in virtue of its experience and authority to centralize the leadership of the proletarian struggle," the statements that the Party "incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the working class," and that "the Party personifies the unity of proletarian principles, of proletarian will, and of proletarian revolutionary action"—are wholly inadequate to sustain a finding that the Communist Party as an organization believes in, advises, advocates or teaches the overthrow by force and violence of the Government of the United States. Precisely the same language was before this Court in *Herndon* v. *Lowry*, 301 U. S. 242, 249-250, and was said in the opinion by Mr. Justice Roberts to be "innocent upon its face however foolish and pernicious the aims it suggests" and a "vague declaration" amounting "merely to a statement of ultimate ideals." The Government suggests that this characterization was made "from the standpoint of the criminal insurrection statute of Georgia" (Gov't's Brief, p. 37, n. 9). That is, of course, true but, in the present context, irrelevant. The issue in the *Herndon* case was the validity under the due process clause of the Fourteenth Amendment of the Georgia insurrection statute as applied to the facts of that case, but the statement with respect to the present language was made in a general discussion of the evidence as to the allegedly criminal aims of the Communist Party. It is therefore strictly applicable to the

issue in this case. Indeed, the innocuous quality of this document is implied in the statement that the Government finds it "unnecessary to consider" whether "such phrases as 'proletarian revolutionary action' and 'revolutionary theory of Marxism' would be too equivocal in themselves to support the conclusion that the Communist Party believes in the overthrow of the Government by force and violence" because of the "additional evidence bearing on their meaning" (Gov't's Brief, p. 37).

The additional evidence in the record upon which the Government relies, does not remove their "too equivocal" character or provide an adequate basis for supporting the finding in the warrant. This evidence consists of several extracts from a magazine dated April, 1934, entitled "The Communist, Eighth Convention Issue, a magazine of the Theory and Practice of Marxism-Leninism, published monthly by the Communist Party of the United States of America" (R. 45). There was no authentication of this document. The only testimony with respect to it was respondent's statement that he never knew such a publication existed, had never received it or seen it, knew nothing about the quotations read into the record and understood some but not others (R. 55-56). The record does not indicate the nature of the literature from which the extracts are taken—whether articles, book reviews or something else—and only in one case is the author's name cited (Exhibit D, R. 46 "By Wan Ming"). In no case is there any statement by the Communist Party that the ideas expressed are those of the Party. For all that appears they are, except for several unverified quotations, the views of the unnamed individual author, and not even his opinion of the official doctrines, if any, of the Party. The fact, if it is the fact, that the magazine is published by the Communist Party does not serve to give official sanction to everything said in every article in a particular issue. Nor is there anything in the membership book to warrant such an

interpretation. Party discipline is enjoined, it is true, but "until the Central Committee has decided them" the "discussion on basic Party questions or general Party lines can be carried on by the members" (R. 36). Insofar as this literature can be said to discuss "basic Party questions" there is nothing to indicate that they were not within the domain of open discussion. Moreover, the magazine purports to have been published in 1934 at a time when respondent concededly had ceased to be a member of the Communist Party. Even if the literature gave expression to official doctrine there is no justification in the evidence for the assumption that the doctrine prevailed during the period of respondent's membership. Internal evidence in some of the extracts shows that they related to matters which had not occurred until after his membership ceased (See *e. g.*, reference to Austrian revolt of February, 1934). There is no foundation for the suggestion in the Government's petition for certiorari (p. 15) that its assumption is warranted "since no attempt was made by respondent to show that the principles of the party had undergone any pertinent change in the interval." The burden of proof that the Communist Party falls within the statutory class was certainly on the Government and the burden of explanation could be shifted to respondent only by the introduction of evidence sufficient to warrant a finding that it was. No inference can be drawn from silence unless there is a duty to speak (Cf. *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 111-112; *Bilokumsky* v. *Tod*, 263 U. S. 149, 153; *U. S. ex rel. Kettunen* v. *Reimer*, 79 F. [2d] 315, 317 [C. C. A. 2nd]); as to this issue, respondent, who answered all the questions put to him, was under no duty to say any more. Nothing in the record would justify putting on him the burden of exegesis of a document which he had never seen or heard of before and which, in part, he did not understand (R. 56).

Even if all of these difficulties are disregarded and the extracts from "The Communist" could be imputed to the

Communist Party and related back to the period of respondent's membership, they are nevertheless inadequate to sustain the finding which the Government seeks to sustain. In all, there were seven extracts, constituting less than three pages of the Record but extracted, as the Record shows, from a publication containing approximately 100 pages. Only two of the extracts are quoted in full in the Government's brief and two in part. When all seven are examined, with proper regard for the fact that the examining officer tore these extracts from their setting, it becomes perfectly clear that they do not contain advocacy of violence in the United States at all.

In appraising such documentary evidence, as in evaluating the statements in the membership book, it would be, of course, necessary to read the documents as a whole and not to wrench words or phrases from their context and thus achieve a false emphasis unjustified by their setting. This principle, to be applied in considering this documentary matter, is the familiar one applied in criminal and civil libel actions, in slander actions and prosecutions for obscenity, which requires writings and utterances to be construed as a whole. See *United States* v. *One Book Entitled Ulysses*, 72 F. (2d) 705 (C. C. A. 2nd); *United States* v. *Dennett*, 39 F. (2d) 564 (C. C. A. 2nd); *Dupont Engineering Co.* v. *Nashville Banner Publishing Co.*, 13 F. (2d) 186, 189 (D. C., M. D., Tenn.); *Commercial Pub. Co.* v. *Smith*, 149 Fed. 704, 706 (C. C. A. 6th); *Halsey* v. *New York Society*, 234 N. Y. 1, 4; *Klaw* v. *New York Press Co., Ltd.*, 137 App. Div. 686, 688; *Daniel* v. *Moncure*, 58 Mont. 193, 200; *Flaks* v. *Clark*, 143 Md. 377, 382; *Stevens* v. *Storke*, 191 Cal. 329, 334; *Moore* v. *Booth*, 216 Mich. 653, 656; see also the dissenting opinion in *Schaefer* v. *United States*, 251 U. S. 466, 483. Furthermore, proper judgment upon the true meaning of the documents requires recognition of their generic relationship to political tracts both American and foreign, which traditionally contain rhetoric

and overstatement that the average reader naturally discounts and usually is intended to discount. As Judge Anderson has suggested in a similar connection, "* * * it is notorious that political platforms generally adopt the language of exaggeration. Both religious and political crusaders commonly use the nomenclature of warfare. Here in the Occident, freedom, and a saving sense of humor and of proportion, have, until recently, saved us from being frightened by crusaders' rhetoric. In an Oriental missionary field, 'Onward Christian Soldiers' is said to be regarded as an alien, seditious war song, the use of which the missionaries had to abandon * * *". (*Colyer* v. *Skeffington*, 265 Fed. 17, 59 [D. C. Mass.], reversed, 277 Fed. 129 [C. C. A. 1st]).

The first extract quoted in full (Gov't's Brief, pp. 37-38) appears to be drawn from a critical discussion of the views of one De Leon. The statement is made that "In a period of imperialism, to propagate for a proletarian revolution without carrying on propaganda and preparation for the mass political strike and for an armed insurrection of the fight for power (sic), means to disarm the workers in the fact of the attack of the bourgeoisie." This hypothetical assertion of an opinion about a matter of fact was apparently made in explicating and criticizing the writings of De Leon; for the next paragraph makes the point that "in spite of his revolutionary phrases," "De Leon's conception of the proletarian revolution was the same, as far as the deception for (sic) the American proletariat goes, as that of the reformists of the Second International." The nature of the doctrine criticized remains as obscure as the criticism itself. This obscurity is enhanced rather than diminished by the quotation which follows from what is referred to as Lenin's "classical formulation about Kautsky's position on this point, which can fittingly apply to De Leon." Lenin's statement, which purports to be quoted from his *State and Revolution* (p. 20, In-

ternational Ed.), is: "The necessity of systematically fostering among the masses this and just this point of view about violent revolution lies at the root of Marx' and Engels' teachings. The neglect of such propaganda and agitation by both the present predominant social-chauvinists and Kautskyist currents being [bring?] their betrayal * * * into prominent relief." While this may be taken as a statement that some "point of view about violent revolution" is basic in the teachings of Marx and Engels, it leaves the reader completely in the dark as to what *this* point of view is. Nor is the matter clarified by the subsequent statement, not by Lenin, but by the anonymous writer in *The Communist* that the "*question* of a violent revolution lies at the root of Marx's teachings. Only philistines or downright opportunists can talk about revolution without violence." Whatever the merit of these observations, in the unrevealed context of ideological controversy in which they appear to have been made, they cannot be deemed to disclose the position of the Communist Party. The Government argues that the foregoing extract "contains an interpretation of the 'revolutionary theory of Marxism' [the phrase used in the membership book] which expressly repudiates the notion that it is compatible with peaceful and orderly change" (Gov't's Brief, p. 37). Where the alleged explanation of the commentator is, as here, at least as obscure as the matter to be clarified, it can hardly be thus contended that, together, they shed light.

The second quotation in the Government's brief (p. 38) is a portion of an extract from *The Communist* which purports to be a quotation from the Program of The Communist International to the effect that "The Party must neither stand aloof from the daily needs and struggles of the working class nor confine its activities exclusively to them. The task of the Party is to utilize these minor every day needs as a starting point from which to lead the working class to the revolutionary struggle for power." The

full text of the extract in the record (R. 47) from which this passage is taken provides slight indication as to the context in which the quotation is made. The extract begins: "Such a formulation of the question is certainly not Marxian"—without indicating what the question or the formulation thus characterized are. It continues: "To confine the work of the Party to the propagation of the final overthrow of capitalism, without mobilizing the workers for struggle against capitalism, is nothing less than the betrayal of the working class to the bourgeoisie. The task of the revolutionary party of the working class is to defend the every day interests of the working class, but to do so in such a way that the workers will understand from their own experience, that only with the overthrow of capitalism and the establishment of the rule of the working class will their interests be finally secured." The extract is completed by the quotation set forth above and emphasized in the Government's brief.

To interpret this extract as an expression of belief in or advocacy of the violent overthrow of the Government of the United States is to give to words a meaning which they cannot, on any reasonable interpretation, bear. On the contrary, if the language may be read to refer to political activity in the United States at all—the most that can be said is that it teaches a patient devotion to the cause of the workers so that they may understand from their own experience that under capitalism their interests cannot finally be secured. The references to "the struggle against capitalism", to "the overthrow of capitalism" and the "revolutionary struggle for power" do not imply the use of force any more than do analogous phrases in the membership book, and do not advert to the Government of the United States.

The third extract quoted by the Government (pp. 39-40) Exhibit E (R. 46-47) is an anonymous statement followed by a reference, apparently by way of citation to "Stalin, 'The October Revolution and the Tactics of the Bolsheviks,'

Leninism, International Publishers, Vol. I, pp. 215, 216." It reads as follows:

"It is more than likely that in the course of the development of the world revolution, there will come into existence—side by side with the foci of imperialism in the various capitalist lands and with the system of these lands throughout the world—foci of socialism in various Soviet countries, and a system of foci throughout the world. As the outcome of this development, there will ensue a struggle between the rival systems, and its history will be the history of the world revolution. The world-wide significance of the October revolution lies not only in the fact that it was the first step taken by any country whatsoever to shatter imperialism, that it brought into being the first little island of socialism in the ocean of imperialism, but likewise in the fact that the October revolution is the first stage in the world revolution and has set up a powerful base whence the world revolution can continue to develop."

Insofar as this passage appearing in the record, without any indication of its context, is meaningful at all, it is obviously nothing but a prophecy of the future trend of events in some unidentified part of the world, written with particular reference to the effect thereon of the Russian revolution. If the citation at the end is to be taken as a clue to the context, it seems quite clear that the statement was made in the course of an historical analysis of the October revolution in Russia. It has no bearing upon the program of the Communist Party or the attitude of that party with respect to the Government of the United States.

The fourth extract quoted by the Government's Brief (p. 40 from Exhibit C, R. 46) is preceded by the following paragraph which is not quoted in the Brief: "The call for help of the Central Executive Committee of the Chinese Soviet Republic must not remain without a wide echo, which should be translated into acts." As this paragraph indicates the entire passage deals with China. At the most, it suggests that the Communist Parties should attempt to

induce the workers to refuse to transport munitions intended for use against the Chinese Soviet Republic and should organize "actions" "directed against the intervention of American, European and Asiatic imperialists."* This (with the one in the margin), indeed, is the only reference to America contained in the extracts from *The Communist* appearing in the record. We think it too plain for argument that to urge that the workers refuse to transport munitions to China in the interests of imperialists is not to urge or to believe in the violent or forcible overthrow of the Government of the United States.**

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*In a footnote to the Government's Brief (p. 40, n. 11) it is stated that a part of this extract is taken from the fourteenth condition of admission into the Communist International and that it is so stated at page 392 of *The Communist*, the same page from which the extract was read. As this statement does not appear in the record, it is not properly before this Court. See pages 32-9 *infra*. It is further stated by the Government that there were 21 such conditions formulated and adopted by the Second World Congress of the Communist International in 1920 and that these were enforced while respondent was a member of the Communist Party of the United States. There is no evidence in the record with respect to either of these propositions and neither of them may be judicially noticed. See p. 33, *infra*.

**Exhibit D (R. 46) not quoted in the Government Brief also deals with China, apparently in the same article, and suggests that there is something exceptional about the Chinese situation under discussion. It reads: "The first and most important difference is that the plan of the campaign, the intervention of the International Imperialists (America, Japan, England, France, Germany and others) against the Chinese Soviet Republic has been worked out with greater frankness, more nakedly, with greater energy and solidarity. All the other differences result from this most important one." It is needless to add that this statement is no more susceptible of construction as the expression of belief in or advocacy of the overthrow of the United States Government by force or violence than the paragraph discussed in the text.

The two remaining extracts from *The Communist* appearing in the record are not discussed in the Government's Brief. They have, however, an interesting bearing on the contention that the documentary evidence establishes that the Communist Party believes in and seeks the forcible overthrow of the United States Government.*

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*The first of these (Exhibit A, R. 45) is as follows: "The Austrian revolt bore out the correctness of the prediction made by Comrade Stalin, in his report to the Seventeenth Congress of the Communist Party of the Soviet Union. On the 26th day of January, seventeen days before the Austrian revolt, Comrade Stalin had declared: 'But if the bourgeoisie chooses the path of war, then the working class in the capitalist countries who have been reduced to despair by four years of crisis and unemployment takes the path of revolution. That means that a revolutionary crisis is maturing and will continue to mature. And the more the bourgeoisie becomes entangled in its war combinations, the more frequently it resorts to terroristic methods in the struggle against the working class and the toiling peasantry, the sooner will the revolutionary crisis mature.' The Austrian workers took the path of revolution—and their guns dealt death to Austro-Marxism."

The second extract (Exhibit B, R. 45-46) is as follows: "How aptly the theory of Austro-Marxism matches its practice! Recently the leader of Austrian social-democracy, Otto Bauer, declared: 'In Austria, more than in almost any other country, there is the prospect that State power will be won by the working class along the road of democracy. If but the proletariat here will understand merely how to make use of their legal opportunities, then very soon the bourgeoisie will begin to shout, as Odilion Barrot did in 1849: "La legalite nous tue!" (Legality is killing us!) If at the same time our soldiers, our gendarmes, our schutzbund is defending republican legislation, then the bourgeoisie will be unable to smash this legislation, since the legal measures of the election address place the legal powers in our hands!' Very true, Herr Bauer, legality has killed us! But it is not Odilion Barrott, nor Englebert

(*Footnote continued on next page.*)

Both of these passages deal with Austria. The first sees in the Austrian revolt the fulfillment of a prediction by Stalin that the more frequently the bourgeoisie "resorts to terroristic methods in the struggle against the working class and the toiling peasantry, the sooner will the revolutionary crisis mature." Such a prediction may be accurate or inaccurate and one may be correct or incorrect in regarding the Austrian workers' revolt as evidence of its accuracy. But what is more significant for the present purposes is that, as the second extract makes clear, the Austrian workers' revolt is referred to as a revolt against a fascist regime occurring after the destruction of republican government and of the workers' political rights. The reference "to the call of the Communist Party for the general strike" is to a strike against "the fascist offensive." The "revolutionary crisis" matures because of terroristic methods

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(Footnote continued from previous page.)

Dollfuss—but the workers of Austria who cry out these words! They whom you subjected for decades to the use of their "legal opportunities"; whom you allowed to be systematically disarmed, lest they use their extra-legal opportunities; whom, by your own confession, you held back in March of last year from responding to the call of the Communist Party for the general strike that would have broken the fascist offensive; whom you betrayed by your advocacy of the use of "legal opportunities" of accepting fascist decree after decree. They whom you urged to retreat before the government's attacks upon their living conditions, whom you instructed to offer no resistance to the destruction of their political rights;—they whom you taught to defend bourgeois republican legislation, the Schutzbund, whose dissolution you permitted without a summons to resistance as a stoic exercise in the use of the legal "opportunities" of obedience to fascism; they whom you tried to chain to the United front with fascism in the black shirt under the pretense of fighting fascism in the brown shirt—it is they who cry "Legality has killed us!" The workers of Austria cry out these words.'".

directed against the workers by the bourgeoisie. When read along with these passages, we submit that if the extracts in the record could be accepted as official explanations of the "revolutionary theories of Marxism" and the Communist program, which we deny for reasons stated above, they would indicate no more than a prediction that democratic processes would, in the course of time, be subverted by a capitalistic revolution against republican forms, as they were in Austria, and that the workers should be prepared, if that moment arrives, to meet the force of the usurper with force. The evidence is insufficient to sustain a finding that the Communist Party holds this view with respect to the United States but even were the evidence sufficient it would not bring the Party within the statutory class. The "government of the United States" referred to in the statute must be taken to be a government established in accordance with the Constitution of the United States, not a government established by a coup d'état. The statute is directed at advocacy of forcible and violent revolution against the lawful government, not at advocacy of counter-revolution against an usurper, occurring after the present government has already been overthrown, advocacy of which would necessarily be entirely hypothetical.

To buttress the documentary evidence above described, the Government points (Brief, p. 42) to respondent's testimony at a preliminary examination before an Immigrant inspector (R. 32-33). Respondent stated, according to the record, that he was familiar "with the intents and purposes" of the Communist Party at the time he joined, that he had acquired such knowledge from study for about ten years of the writings of Marx, that he was "in accord with Marx in regard to the social order of things", that the Party "proposes to destroy capitalism and establish a Government by the people", a government "similar to that now in existence in Russia". Thereafter the following colloquy appears:

"Q. What means will the Communist Party of America use to attain its purpose?

A. I do not know what will be necessary.

Q. Will it resort to armed force in the event that should be necessary?

A. That is what they say.

Q. Who says that?

A. The leaders of Communism.

Q. Do you mean the local leaders, the national leaders, or those in Russia?

A. All of them.

Q. Do you think that the present form of Government in the United States should be destroyed and a Communistic or Russian form of Government established in the United States?

A. I think that the destruction of capitalism is inevitable and that the sooner it comes the better off we shall all be.

Q. Would you personally bear arms against the present U. S. Government?

A. Not at this time.

Q. Why not at this time?

A. Because Communism is not strong enough now.

Q. Supposing that the majority of the populace of the United States were Communists, and were certain of a victory over capitalism in an armed conflict, would you then personally bear arms against the present Government?

A. Certainly; I would be a fool to get myself killed fighting for Capitalism."

When the record of this preliminary hearing was offered in evidence at the first hearing on the warrant of deportation, respondent testified that the "answers as transcribed were not as given by me" and that he was "excited and intimidated" (R. 10, 6). The immigration officer who

transcribed the proceedings admitted that the report was not *verbatim*, that he might have edited it "* * * to correct the grammar, transposition or something of that sort * * *" (R. 6). It is a striking fact that neither at the naturalization hearing which preceded nor at the two deportation hearings which followed is there any indication that respondent understood the Communist program to envisage the use of force at any time; his testimony is inconsistent with such a view. But even if respondent made the statement attributed to him at the preliminary hearing, that the leaders of Communism "say" that they will "resort to armed force in the event that should be necessary", the statement is patently ambiguous and wholly insufficient to sustain the finding. There is no indication as to whom the "force" referred to will be directed against or what the notion of "necessity" involves, especially in view of the accompanying statement that the "destruction of capitalism is inevitable and the sooner it comes the better off we shall all be". It was apparently to remedy this latter defect that the examiner put the hypothetical case of a majority of the people Communists and certain of a victory over capitalism. Respondent's answer that "I would be a fool to get myself killed fighting for Capitalism", even if it represented Communist doctrine, instead of a mere indication of a strong instinct of self-preservation, hardly warrants the inference that the reference to the use of armed force, if necessary, disclosed a Party purpose to overthrow the Government of the United States. That portion of the proceedings was aptly characterized by the Court below as a foolish answer to a foolish question, "according to its folly" (R. 73).

Viewing the evidence in the record, as a whole, it is clearly insufficient to sustain the finding that the Communist Party believes in, advises, advocates and teaches the overthrow by force and violence of the Government of the United States. The literature read in evidence,

consisting as it does for the most part of "poor and puny anonymities" containing theoretical discussion in which no reference is made to the Government of the United States (Holmes, J., dissenting in *Abrams* v. *United States*, 250 U. S. 616, 629) suffices to establish no more than that the epithet "revolutionary" is applied in various contexts to Communist ideas, which admittedly call for a profound transformation in the structure of society and a shift in the locus of political power. Ideas far less transforming, changes far less profound have been labelled "revolutionary", without implying that they contemplated or involved the use of force against established Government.

As a distinguished judge has said, "Opponents of changes in Government generally describe those changes as 'revolutionary'—as involving 'a destruction of our ancestral liberties'. The Thirteenth, Fourteenth, Sixteenth and now the Eighteenth Amendments have all been denounced as revolutionary. It is a question of degree and of the point of view. But our Government is not yet overthrown. Institutions grounded on liberty and justice under law are too well-rooted to warrant us in being terrorized by criticisms and mooted changes". Anderson, J., in *Colyer* v. *Skeffington, supra.*

In the effort to strengthen the paltry evidence in the record, the Government quotes two passages from a document entitled "Program of the Communist International", published by Workers Publishing Co., Inc. (N. Y. 2d ed. 1933) pp. 36-37, which is said to be an "official* English text" of the "Program, which was adopted on September 1, 1928, at the Sixth World Congress of the Communist International held at Moscow". Further extracts from this document are set forth in an appendix to the Government's Brief (pp. 80-92) along with another document (Appendix C, pp. 93-100) said to be "The Twenty-one Condi-

*Nothing in this pamphlet states that the text is "official".

tions of 'Admission into the Communist International", adopted at the Second Congress of the Communist International held in Moscow, July 17 to August 7, 1920, published by Workers Library Publishers, Inc. (N. Y. 1934). At another point in the Brief, this second document is said to represent conditions which "were in force while respondent was a member of the Communist Party of The United States" (p. 40, n. 11) but there is no evidence to that effect.

Neither these documents nor any language contained in them may be now invoked to sustain the finding in the warrant of deportation.

First: The agreed statement of facts explicitly states (R. 7): "The Government exhibits introduced here constitute the record on which the order of deportation is based". Neither of the documents referred to is included in the record. The Government does not contend that notice was taken of these documents in the administrative proceeding, and under the terms of the stipulation it must be assumed that they were not considered in reaching the administrative finding contained in the warrant. Indeed, if they were considered, the finding would be defective because of the absence of a full record containing all the evidence on which it is based. *Kwock Jan Fat* v. *White*, 253 U. S. 454; *Tod* v. *Waldman*, 266 U. S. 113, 119; *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 339. Nor can the administrative action be sustained on the theory that the administrative tribunal had taken judicial notice of the existence and contents of the documents. Quite apart from the question whether the existence and contents of the documents is within the range of judicial notice, it is well settled that an administrative finding which can only be made after a hearing cannot be sustained upon the basis of facts or documents known to the administrative tribunal if the supposed facts or the evidence from which they are

inferred is not disclosed in the administrative record. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 300-306; *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U. S. 88, 93-94; *U. S.* v. *Abilene & Southern Railway Company*, 265 U. S. 274, 288. Since these documents were not and could not have been considered by the administrative tribunal, they are unavailable in a judicial proceeding, the purpose of which, as this Court has frequently said (*Tang Tun* v. *Edsell*, 223 U. S. 673, 681-682; *Zakonaite* v. *Wolf*, 226 U. S. 272, 274-5; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106; *Lloyd Sabaudo Societa* v. *Elting*, *supra*, 335-6) is to review the sufficiency of the evidence upon which the administrative finding was based. Compare *Gegiow* v. *Uhl*, 239 U. S. 3, 9. Such indeed, is a necessary corollary of the Government's argument here in objecting to the amendment of the judgment in the Court below to order a *trial de novo* in the District Court (Government's Brief, pp. 55-61). If, as is contended, it would be error for the District Court to take additional evidence on the questions administratively determined, because it would have undesirable consequences from an administrative viewpoint, it would obviously be far more serious error, affecting interests more important than administrative convenience, to permit an administrative finding on insufficient evidence to be supported by reference to extrinsic documents without their introduction into evidence at all, and without proper opportunity for objection, examination and rebuttal. See *Ohio Bell Telephone Company* v. *Public Utilities Commission*, *supra*.

Second: The Government does not make explicit the theory upon which it contends that this Court may consider the additional documents set forth in the brief in determining the sufficiency of the evidence to support the finding contained in the warrant. It is obvious, however, that

the documents are relevant only if their contents actually represent the principles of the Communist International at particular times germane here. There is no evidence to that effect and this Court may not take judicial notice that such is the fact. Courts may only take judicial notice of matters of common knowledge. *Ohio Bell Telephone Company* v. *Public Utilites Commission, supra,* at p. 301. While it may, perhaps, be common knowledge that the Communist International issued a set of conditions of admission in 1920 and a Program in 1928, it is not a matter of common knowledge that the documents now referred to by the Government for the first time are the documents issued by that organization. Moreover, even if the authenticity of these documents is to be assumed, this Court cannot judicially notice that the language contained in the documents embodies the actual principles and Program of the Communist International at a time which is relevant in the present case. Indeed, if there is any relevant fact within the range of judicial notice, it is that there has been much debate as to what the Program of the Communist International means and the extent to which it is accurately set forth in the published Program. See e. g. Florinsky—*World Revolution and the U. S. S. R.* (MacMillan, 1933) especially pages 178, 193, 216, 221, 222, 245, 248, cited Gov. Br. p. 43; Trotsky—*The Third International After Lenin* (Pioneer Publishers, New York 1936); Browder, *The People's Front* (International Publishers, 1938); Strachey, *The Coming Struggle For Power* (Modern Library ed., 1935) Intro. vii-xx ["The Question of Force and Violence"]. This Court cannot consider the documents cited by the Government as bearing upon this question unless it is also prepared to take notice of other books and documents which bear upon the truth of the contention which the Government seeks to maintain. Indeed, if judicial notice were to be taken of this language on the theory that it is contained in historical documents, there is much in the literature

and in the history of Communism as an intellectual and political movement in the Western World that would have to be noticed in determining whether the language is to be interpreted literally, as the Government argues, rather than symbolically or rhetorically. The complexity of the subject which would thus be drawn into the domain of judicial notice is well indicated by Mr. Justice Evatt of the High Court of Australia, in an opinion in *The King* v. *Hush; ex parte* Devanny, (1932), 48 C. L. R. 487, 516-518, set forth below:

> "There is much in the matters averred and printed to suggest that the Communist Party advocates that the whole Parliamentary machine must be completely changed—transformed—revolutionized, in order that a monopoly of political power shall be given to the working class, and that owners of private industries, property and wealth shall be dispossessed without compensation; further, that it is highly probable that so great a change, whether or not it is approved by the majority or ordained by law, will not be acquiesced in without resort to force on the part of those dispossessed, that, in this sense, a violent civil upheaval will, almost certainly, accompany the proposed transformation of society and that actual civil violence and disturbance will accompany the attempted socialization of industry.
>
> "In order to determine the bearing of all these matters, reference would have to be made to the leading exponents of more modern Socialist thought, from Marx and Engels onwards. It is a subject upon which every student of history, political science, sociology and philosophy should be tolerably well informed. Even the averments in the present case include a historical reference to the three Internationals. In the ultimate ideal of a classless society, the Communist movement

has much in common with the Socialist and working-class movement throughout the world. They all profess to welcome a revolutionary change from the present economic system, which, conveniently enough, is called Capitalism, and the more violent protagonists of which are now called Fascists. The doctrine of the class struggle raises a dispute as to fact, rather than opinion. It is not a question whether it is desirable to have a struggle between a property-less class and a property-owning class, but whether such struggle exists in fact. The Communists claim that democratic institutions conceal, but do not mitigate, the concentration of political and economic power in the property-owning class, and that, for such dictatorship, there should be substituted the open, undisguised dictatorship of the property-less classes. They say that it is extremely probable that a violent upheaval will ensue when the time comes to effect such substitution (*Encyclopedia Britannica*, 12th ed., vol. 30, p. 732 (*R. P. Dutt*); cf. *Laski's Democracy in Crisis* pp. 194, 226, 227, 241.)

" 'When the time comes.' It is, it would seem from the writings in evidence, the element of time which must be closely examined in determining whether at the present, or in the near, or very far distant, future there is to be any employment of violence and force on the part of the classes for which the Communist Party claims to speak. 'The inevitability of gradualness' as a Socialist and Labor doctrine, the Communists reject. But they believe and advocate that a Socialist State must inevitably emerge from the very nature of capitalist economy. But when? So far as the evidence placed before us goes, there is no answer to this question. So that one possible argument, which may be open to the Communist Party in explaining their references to physical force, is that force and the

threat of force are far distant from the present or the near future. The history of the attempts and failures of Communism to gain control of other political movements of the working classes may tend, upon close analysis, to show that, to turn the phrase, Communism illustrates the gradualness, the extreme gradualness, of inevitability".

The portion of the article in the Encyclopedia Britannica, 12th ed., vol. 30, p. 732, referred to in the foregoing excerpt from the opinion of Justice Evatt reads as follows:

"Communism and Democracy. It is from this point of view that the controversy of communism and democracy should be approached if the communist position is to be understood. The communists do not reject the current conceptions of democracy because they believe in the superiority of the few, but because they believe that the phrases of democracy bear no relation to present realities. The divorce between the realities of power and the theory in modern democratic states has been noted by observers of all schools; it is the special point of the communist to insist that this divorce is not due to accidental and remediable causes, but is inherent in the nature of capitalist democracy. Democracy, in fact, is held to be unrealizable in capitalist society because of the fundamental helplessness of the propertyless man; the parliamentary forms only serve to veil the reality of the 'bourgeois dictatorship' by an appearance of popular consent which is rendered unreal by the capitalist control of the social structure; and even this veil is cast aside in moments of any stress by the open assumption of emergency dictatorial powers. The plea that this situation may be remedied by education and propaganda is met by the reply that all the large-scale

organs of education and propaganda are under capitalist control.

"On the other hand, communism, while rejecting current democracy, differs from syndicalism and other revolutionary philosophies which proclaim the right of the 'militant minority' to endeavor to change society. The glorification of the minority and of the *coup d'état* really belongs to the Blanquist school, which was always vigorously opposed by Marxism. Marxism taught that the liberation of the workers could only be the act of the workers themselves, and that all the communists could do was to endeavor to guide the struggle of the workers into its realization in the dictatorship of the proletariat. In this way the Bolsheviki did not carry through their revolution of Nov., 1917 until they had gained the majority in the Soviets and the trade unions. Where the communists differ from other believers in the ultimate victory of the working class is that they do not believe that victory will be achieved until after a very much more severe struggle than is ordinarily contemplated. They believe that the ruling class will use every means, political, economic, and military, to defend its privileges, and that the final decision will not be reached without open civil war. In support of this they quote evidence to show the readiness of the ruling class in many countries to fling constitutional considerations to the winds when their privileges are in danger. To mistake dislike of this prospect for evidence of its improbability they regard as a fatal policy, and they believe it necessary, therefore, to make preparations for the event, considering the best guarantee against the chaos of prolonged social disorder (otherwise inevitable in the period of capitalist dissolution) to be the existence of a powerful revolutionary party. It is this aspect of communism which has led to the cur-

rent distinction between communism and other forms of socialism as a difference in method: but it will be seen that this difference of method arises from a far more fundamental divergence in outlook and in philosophy. The methods of the communists are not comprehensible save in relation to the whole philosophy of *The Communist Manifesto.*"

These complexities suffice to indicate that judicial notice may not be employed to bring into the consideration of the present case the documents cited in the Government's brief. This Court has recently reaffirmed the rule that if matters are disputable they are not within the realm of judicial notice which merely serves, in any event, to place upon the opposing party the burden of disproving the fact judicially noticed. *Ohio Bell Telephone Company* v. *Public Utilities Commission, supra.*

In none of the cases in which this Court has had occasion to pass upon the sufficiency of the evidence that particular organizations advocate illegal doctrines has it been suggested either that the principles of the organization themselves or that documents evidencing those principles are within the scope of judicial notice. See e. g. *Herndon* v. *Lowry,* 301 U. S. 242; *Fiske* v. *Kansas,* 274 U. S. 380; *Whitney* v. *California,* 274 U. S. 357; *Gitlow* v. *New York,* 268 U. S. 652. See also *ex parte Fierstein,* 41 F. (2nd) 53 (C. C. A. 9th). In all, the question has properly been regarded as one to be determined on the basis of the evidence in the record, and upon the basis of that evidence, convictions have been both reversed and affirmed. Indeed, in *Fiske* v. *Kansas, supra,* a conviction was reversed although the organization involved was the same as that considered in *Burns* v. *United States,* 274 U. S. 328, decided the same day, on which the conviction was affirmed.

The Government does not argue in the present case that either the administrative tribunal or the Court may

take judicial notice of the principles or policies of the Communist Party as such. For precisely the same reason that such a contention could not be sustained, namely, that the question is disputable, there is no justification for resorting to documents extrinsic to the record to supplement the evidence which the record contains.

That the question whether the Communist Party believes in or advocates the forcible overthrow of the Government is one to be determined by proof in the normal course has been recognized impliedly, if not expressly, by the Committees on Immigration of both the Senate and the House of Representatives in reports recommending additional legislation including Communists by name in the statutory list of excluded classes. H. R. Rep. 71st Congress Third Session, No. 2797 (by Mr. Cable); H. R. Rep. 72nd Congress First Session, No. 1353 (by Mr. Dies); Senate Rep. 72nd Congress First Session, No. 808 (by Mr. Patterson and Mr. Hatfield); H. R. Rep. 74th Congress First Session, No. 1023 (by Mr. Starnes). In the last three of these reports reference is made to the "fact that the law does not now make an alien Communist as such subject to exclusion and expulsion." It is not without significance that the recommended leglislation has not become law.

The Government argues that the statute applies to membership in an organization that believes in, advises, teaches or advocates the overthrow of the United States Government by force at any time no matter how hypothetical or remote. Assuming this interpretation of the statute, and conceding that "much of the language used is susceptible of an interpretation more rhetorical than literal" (Government's Brief, page 46), it urges that nevertheless "when the evidence before the Secretary is considered as a whole, whether or not supplemented by these additional portions

of the Program", it cannot "fairly be said that within the test laid down by this Court in the *Vajtauer* case . . . there was not evidence to support the finding in the deportation warrant" (Government's Brief, page 48). The emphasis put upon the statement in the opinion in the *Vajtauer* case (273 U. S. 103, 106) that "upon a collateral review in *habeas corpus* proceedings, it is sufficient that there was *some* evidence from which the conclusion of the administrative tribunal could be deduced" (Government's Brief, pages 15-16) is instinct with the intimation that the scope of judicial review in this proceeding is exceptionally narrow and that, were the scope of review somewhat broader, the finding could not be sustained. It is clear, however, that if by "*some* evidence" the Government means to suggest that the finding can be sustained although the evidence was *unsubstantial*, the suggestion is wholly without foundation.

The statute provides that "the decision of the Secretary of Labor shall be final" and this has been interpreted to mean final on questions of fact but not of law. *Gegiow* v. *Uhl*, 239 U. S. 3, 9; see also *Kwock Jan Fat* v. *White*, 253 U. S. 454, 457-8; *Japanese Immigrant Case*, 189 U. S. 86, 100, 101; *Zakonaite* v. *Wolf*, 226 U. S. 272, 274-5; *United States ex rel Bilokumsky* v. *Tod*, 263 U. S. 149. It may indeed be questioned whether the statute has any application in a *deportation* case where, as here, the findings are made and the warrant signed not by the Secretary but by an assistant.* Compare *Morgan* v. *United States*, 298 U. S. 468. But even if the statute applies it is well settled

*It is significant that in the case of exclusion the statute provides that the finding of the Board of Special Inquiry shall be final unless reversed on appeal by the Secretary of Labor [8 U. S. C. §153] whereas in the case of deportation, Section 19 of the Act of 1917 [8 U. S. C. §155] provides only that "the decision of the Secretary of Labor shall be final."

that an administrative finding which is unsupported by substantial evidence on a material question of fact is contrary to law. As this Court observed in an opinion by the Chief Justice in *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Co.*, 289 U. S. 266, 277, a "finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority".

In many opinions dealing with the scope of judicial review of administrative findings the words "some evidence" and "substantial evidence" are used interchangeably. See e. g. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U. S. 88, 90-91, 94, 98, 100; in no case has it been suggested that unsubstantial evidence would suffice. On the contrary, this Court has held at this Term that the provision of the National Labor Relations Act that "the findings of the Board as to the facts, if supported by evidence shall be conclusive" "means supported by substantial evidence" and a different formulation of the test by the Circuit Court of Appeals was held to refer to substantial evidence. *Consolidated Edison Co.* v. *National Labor Relations Board*, U. S. , 59 Sup. Ct. 206, 217-7. See also *Washington, Virginia and Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142, 146-7. The same result has been reached with uniformity in other fields of administrative law. See e. g. *Helvering* v. *Rankin*, 295 U. S. 123, 131; *St. Joseph's Stockyards Co.* v. *United States*, 298 U. S. 38, 73, 75 (concurring opinion by Brandeis); *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, *supra*; *Interstate Commerce Commission* v. *Northern Pacific Railway*, 216 U. S. 538, 543-4. As the Circuit Court of Appeals in the Sixth Circuit has

aptly said: "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power". *National Labor Relations Board* v. *Thompson Products, Inc.*, 97 F. (2nd) 13, 15. Substantial evidence was defined in the *Consolidated Edison* case, *supra*, as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".

The rule of substantial evidence was articulated in a deportation case involving a similar question many years ago by the First Circuit Court of Appeals (*Skeffington* v. *Katzeff*, 277 Fed. 129) and by the Circuit Court of Appeals for the Fifth Circuit (*Lisotta* v. *United States*, 3 F. [2d] 108, 111). We submit that there is nothing in the decisions in *Vajtauer* v. *Commissioner of Immigration*, *supra*, or *Tisi* v. *Tod*, 264 U. S. 131, 133 to justify the conclusion that a less rigorous standard of sufficiency is applicable here. In both of those cases only constitutional questions were presented. The aliens contended that because of the insufficiency of the evidence the order of deportation constituted a denial of due process of law. It was in that connection that this Court stated that the order would be sustained if the finding upon which it rested was supported by "some" or "any" evidence. In view of the character of the evidence and the extent of its consideration by this Court as well as for the other reasons stated above, we submit that this formulation was not intended to refer to evidence which is "unsubstantial" in the sense in which that word is used in other decisions of this Court. But even if the choice of words was intended to point to a distinction in the nature of the governing test, the distinction would have no application here. The petition for habeas corpus alleged that the warrant was void not only because the respondent "has been denied due process of law" but also because the "Labor Department has not correctly construed the Immigration Laws" and because

there is "no evidence in the record of the Labor Department to sustain the finding contained in the warrant of deportation". (R. 2) The statute defining the jurisdiction of Federal Courts to issue the writ of habeas corpus provides that the writ may be issued if the petitioner "is in custody in violation of the Constitution *or of a law* or treaty of the United States". (R. S., Sec. 753, 28 U. S. C. A., Sec. 453, italics ours) If the finding was not supported by substantial evidence, the order of deportation violates the Immigration Law under the authorities cited above even if it does not violate the guarantee in the Fifth Amendment of due process of law.

Nowhere in the Government's Brief is it contended that there is *substantial* evidence to support a finding that the Communist Party of the United States was, during the few months of respondent's membership in 1932 and 1933, an organization that believes in, advises, advocates or teaches the overthrow of the Government of the United States by force and violence at any time, however remote in the future. For the reasons previously stated, we submit that there was no such evidence and, indeed, that even if the test of sufficiency is properly formulated without the qualification of substantiality, the Circuit Court of Appeals properly decided for reasons set forth in its opinion (R. 71) that the finding cannot be sustained.

The Government's argument with respect to the sufficiency of the evidence to sustain the finding is based upon the premise that the statutory reference to an organization "that believes in, advises, advocates or teaches . . . the overthrow by force or violence of the Government of the United States" applies even though the belief or advocacy relates to the use of force "at any time in the indefinite future". (Government's Brief, p. 19) If the premise is

unsound and the statute properly construed refers to the use of force immediately or at some reasonably proximate future time, no effort is made to sustain the finding. We submit that the premise is unsound and that the statute has no application to an organization which speaks of the use of force, if at all, only hypothetically and in the utterly remote, distant future. Accordingly even if the Government's view of the evidence in the present case is accepted the Court below properly held that the finding cannot be sustained.

First: As the Circuit Court of Appeals pointed out in the opinion below the "statute under which these proceedings were instituted was enacted in 1918 and amended in 1920 to meet a situation caused by the crisis in Russia in 1918 and 1919, and the propaganda following that crisis for the overthrow of governments by force. It was enacted to enable the United States to expel from its shores aliens seeking a footing here, to propagandize and proselytize for direct and violent action". (R. 73) The amendment of 1920, following the ruling of the Labor Department that the I. W. W. was not shown to be included within the class of organizations specified in the 1918 Act, was said in the Reports of the House and Senate Committees on Immigration and Naturalization to be intended to facilitate the deportation of "aliens actively at work for the destruction of this Government". H. R. Rep. 66th Congress Second Session, No. 504, p. 7; Senate Rep. 66th Congress Second Session, No. 648, p. 4. Nothing in the legislative history of earlier statutes suggests that the problem to which Congressional action was addressed was responsibly defined in any less immediate terms. The scanty reference to "philosophical anarchists" in an opinion of this Court interpreting the Exclusion Act of 1903, *Turner* v. *Williams*, 194 U. S. 279, 292-4, does not warrant the conclusion that the legislation in question here was

directed towards hypothetical problems that the indeterminate future might bring forth. Indeed, prior to the Act of 1918, Congressional attention was concerned primarily with matters relating to exclusion rather than deportation. (See e. g. H. R. Rep. 64th Congress First Session, No. 95; Veto Message of President Wilson, H. Doc. 1527, 63rd Congress 3rd Session.) As Judge Anderson observed in *Colyer* v. *Skeffington, supra*, "'overthrow' is a very large word"; so, too, are "force" and "violence" and "the Government of the United States". In the absence of evidence that Congress was fearful of possible danger so remote as to be almost chimerical, it is hardly to be supposed that it was concerned with aliens whose belief in the necessity or propriety of force envisages some remote time when they anticipate that our society, following what they believe to be a historic cycle of societies in general, will be very different than it is or than it was when this legislation was enacted.* It is reasonable to

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*The Act of October 16, 1918 [40 Stat. 1012] was enacted during the World War and was urged upon Congress by the War and Navy Departments as an urgent measure [56 Cong. Rec., pt. 8, p. 8109, 65th Cong., 2nd Sess.]. Attached to and made a part of House Report No. 645 [65th Cong., 2nd Sess.], accompanying H. R. 12402 which became the Act of Oct. 16, 1918, is a letter from the Secretary of Labor to the Chairman of the Committee on Immigration in which the former declared: "Of course the entry of the United States into the war has created or emphasized problems in connection with these classes which were not anticipated and which probably would not have arisen or become prominent in times of peace." The report itself spoke of certain aliens, "implacable and seditious enemies of our Government, especially since war was declared", to reach whom was one of the main purposes of the bill.

The amending Act of June 5, 1920 [41 Stat. 1008] was enacted in the post-war period of social upheavals abroad, and world-wide uneasiness. That Congress believed that it was dealing with an

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suppose that the statute which applies to all aliens without discrimination, however long their residence in the United States, was directed towards present evils with which the Congress might reasonably be concerned.

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immediate and urgent situation, and not with an abstract problem, is apparent from the committee report and the debates in Congress. House Report 504, p. 7 [66th Cong.; 2nd Sess.], accompanying H. R. 11224 which became the Act of June 5, 1920, which complained that "as the decisions of that department [i. e. Labor] above quoted have resulted in failure to deport aliens *actively at work for the destruction of this Government*, the necessity for the amendment becomes not only apparent but *urgent*." The entire atmosphere of the proceedings on the floor of Congress concerning the necessity of the legislation was that of deep concern with an evil considered both immediate and urgent [59 Cong. Rec., pt. 1, pp. 978-1003, 66th Cong., 2nd Sess.]. The debate was opened by Mr. Campbell, of the Committee on Rules reporting the bill, with a speech denouncing "a disposition and purpose upon the part of a lawless minority to override written constitutions and laws and to accomplish their purposes by direct action" [p. 979]. Mr. Welty, of the Committee on Immigration sponsoring the bill, after having declared that: "There are those who think that the country is unduly alarmed; that there is no danger from the anarchists sailing under the red flag, plotting to overthrow our Government by force and violence and the use of terrorism", read from a report of the Attorney-General to the effect that "a wave of radicalism appears to have swept over the country" since the signing of the Armistice [p. 987]. Mr. Box, likewise of the Committee, urged that during deportation proceedings "none of these desperate and dangerous characters should be released for months on bond" [p. 989]. Mr. Goldfogle urged in support of the bill that: "The disclosures made through investigations by both our Committee on Immigration and the Department of Justice show how widespread is this menace to America" [p. 993]. And Mr. Quin declared: "Let us rush through this law and clear our country of this grave menace" [p. 994].

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Applying the principle that all statutes should be given a sensible construction to further the ends which the Legislature has in view (*Church of the Holy Trinity* v. *United States*, 143 U. S. 457; *Johnson* v. *Southern Pacific Co.*,

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What is even more significant is that H. R. 11224, which became the Act of June 5, 1920, was not contemplated as a measure singling out alien agitators for special treatment because of any peculiar power of Congress over aliens, but was contemplated merely as one measure in a series of measures directed against both seditious aliens and seditious citizens. In the speeches discussing H. R. 11224, it was pointed out by different members of the Committee on Immigration sponsoring the bill, and by other speakers, that similar legislation, directed against citizens, but with criminal penalties attached, was pending, and that a bill to make seditious literature non-mailable was pending, and all the speakers declared that they hoped that such legislation would be enacted. As one example, Mr. Raker of the Committee declared:

> "I simply want to call the attention of the membership of the House to the fact that this bill and this legislation does not deal with the criminal law, and does not make it a crime for a *citizen* of the United States to do any of the acts *provided for in this legislation. Contemplated legislation now pending will take care of the criminal end. There are a number of bills now pending before the Committee on the judiciary making it a crime to do the acts referred to.*" [59 Cong. Rec., *supra*, p. 982, italics ours. See also speeches by Mr. Byrnes, at pp. 980, 981; by Mr. Siegel of the Committee, at pp. 983, 985; by Mr. Quin at p. 993.]

For instances of this proposed legislation, see S. 3317, 66th Cong., 2nd Sess., H. R. 11430; H. R. Rep. 66th Cong., 2nd Sess. No. 536, No. 542. These bills contained a provision that no "person shall orally or by writing teach, incite, advocate, propose, or advise, or aid, abet, or encourage forcible resistance or forcible destruction of the Government of the United States" (Section 3), and also declared

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196 U. S. 1) we submit that the statutory language must be taken to refer to the forcible overthrow of the Government within a reasonably proximate time and that a necessary premise in the Government's argument is, therefore, wholly unsound.*

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illegal "any association which seeks directly or indirectly by force or violence, or by injury to or destruction of human beings, or public or private property, to bring about a change in the Constitution or laws or authority of the Government of the United States. . . ." (Section 9). Section 10 made it a crime for any person "knowing the object, purpose, teaching, or doctrines of such unlawful association" to "become a member thereof or become affiliated therewith, or continue to be a member thereof or affiliated therewith . . .". The reports accompanying these bills contain the following statement: "The life of the Nation is threatened today, the security and safety of our citizens is imperiled, and it is firmly believed that a strong remedy is demanded by our people—and this bill furnishes such a law as will we believe satisfy the country and enable the authorities to grapple with the growing evil in our midst". See also Sedition, Hearing before the Judiciary Committee of the House of Representatives, 66th Cong., February 4, 6, 10, 1920; Sedition, Syndicalism, Sabotage and Anarchy, Hearings before Judiciary Committee of the House of Representatives, December 11, 16, 1919.

In view of the legislative history of the Act of June 5, 1920, it would not be reasonable to give it a wider scope than would be given to a similar statute penalizing citizens.

*There is nothing inconsistent with this position in the prior decisions of this Court. Both in *Turner* v. *Williams*, 194 U. S. 279 and *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, there was evidence referred to by the Court that the aliens had in their public pronouncements addressed themselves to immediate problems in a way which could fairly be denominated "advocacy". In the present case there is no evidence of the attitude of the Communist Party towards any questions of moment at the time when respondent was a member.

Second: An interpretation of the statute to apply to belief in the use of force in the indeterminate, indefinitely remote future would create serious doubt as to its compatibility with the guarantees of freedom of speech, press and assembly contained in the First Amendment. Such a construction must be avoided if possible and there is no obstacle to avoiding it here. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 492; *Japanese Immigrant Case,* 189 U. S. 86, 100-101; *Federal Trade Commission* v. *American Tobacco Company,* 264 U. S. 298, 307; *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401. The Government does not argue that if the statute were enforced by a sanction other than deportation it could be accorded the interpretation sought and still meet the requirements of the First Amendment. It is not denied that the Constitutional guarantees in question extend to aliens along with the other guarantees of the Bill of Rights (*Wong Wing* v. *United States,* 163 U. S. 228, 238; *Lem Moon Sing* v. *United States,* 158 U. S. 538, 547; *Downes* v. *Bidwell,* 182 U. S. 244, 282-3, 294-8; *The Japanese Immigrant Case,* 189 U. S. 86, 100; *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 106) and the Fourteenth Amendment. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369; *Truax* v. *Raich,* 239 U. S. 33; see *Terrace* v. *Thompson,* 263 U. S. 197, 216. Nor is it denied that the beliefs and acts which the statute thus interpreted would comprehend are within the protection of the guarantees of free speech, press and assembly and could not be directly proscribed by the Congress. The Government properly regards the decision in *Herndon* v. *Lowry,* 301 U. S. 242, as establishing at least "that the apprehended danger must have some immediacy and cannot be of an indefinite or remote character if the power of the Government is to be validly exerted". (Government's Brief, page 23) See also *Whitney* v. *California,* 274 U. S. 357, *Schenck* v. *United States,* 249 U. S. 47; *De Jonge* v. *Oregon,* 299 U. S. 353. The contention which it is conceded "involves

practical as well as logical difficulties" (Government's Brief, page 23) is rather that the power of Congress to deport aliens is wholly unlimited by the First Amendment. In support of this contention the Government argues only that this extraordinary immunity of the deportation power from what was intended to be a limitation on all powers of Congress has heretofore been "assumed". We submit that there is no warrant for such an assumption in the opinions of this Court and that the doctrine thus "assumed" is unsound.

In only one case before this Court has the question of the relationship between the power to exclude aliens and the limitations of the First Amendment been presented. In *Turner* v. *William*, 194 U. S. 279, it was argued on behalf of an alien who was charged with illegal entry and ordered deported on that ground, that the statutory provision *excluding* anarchists was invalid if interpreted to apply to "philosophical anarchists". In rejecting the contention this Court said, speaking by Mr. Chief Justice Fuller:

> "We are at a loss to understand in what way the act is obnoxious to this objection. It has no reference to an establishment of religion nor does it prohibit the free exercise thereof; nor abridge the freedom of speech or the press; nor the right of the people to assemble and petition the government for a redress of grievances. It is, of course, true that if an alien is not permitted to enter this country, or, *having entered contrary to law*, is expelled, he is in fact cut off from worshipping, or speaking or publishing or petitioning in the country, but that is merely because of his *exclusion* therefrom. He does not become one of the people to whom these things are secured by our Constitution *by an attempt to enter forbidden by law*. To appeal to the Constitution is to concede that this is

> a land governed by that supreme law, and as under it the power to *exclude*, has been determined to exist, those who are *excluded* cannot assert the rights in general obtaining in a land to which they do not belong as citizens *or otherwise*. (Italics ours.)

The care with which this Court limited this expression, as the foregoing passage indicates, to aliens who are *excluded*, far from justifying the assumption that a similar rule applies to the deportation of an alien from a land to which he *does* belong by virtue of an established legal residence there, justifies the contrary assumption. Compare *United States* v. *Ju Toy*, 198 U. S. 253 and *Quon Quon Poy* v. *Johnson*, 273 U. S. 352 with *Ng Fung Ho* v. *White*, 259 U. S. 276. Indeed, it was precisely on the basis of this distinction as applied to the power over aliens generally that Chief Justice Fuller dissented in *Fong Yue Ting* v. *U. S.*, 149 U. S. 698, 761-3. In that case the constitutionality under the Fifth Amendment of the establishment of an administrative proceeding for the *deportation* of Chinese aliens who failed to comply with the registration requirements imposed by statute was sustained. It was argued for the alien that the registration requirement exceeded the power of Congress and that deportation was a punishment which could not be imposed in an administrative proceeding in which the alien was deprived of the Constitutional protections accorded to persons accused of crime. To sustain the order of deportation it was only necessary to hold that the power of Congress over matters of immigration included the power to require registration and that an order of deportation is not conviction of a "crime" within the meaning of the Sixth Amendment. See *Bugajewitz* v. *Adams*, 228 U. S. 585; *Mahler* v. *Eby*, 264 U. S. 32; *Zakonaite* v. *Wolf*, 226 U. S. 272. It is true that in the course of the opinion by Mr. Justice Gray reference was made to the "right to exclude or to expel all

aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace" as "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare". But this statement was unnecessary to the decision and interpreted literally cannot be sustained. As the same Chief Justice who rendered the opinion of the Court in *Turner* v. *Williams, supra,* said in his dissenting opinion:

> "The argument is that friendly aliens who have lawfully acquired a domicile in this country, are entitled to avail themselves of the safeguards of the Constitution only while permitted to remain, and that the power to expel them and the manner of its exercise are unaffected by that instrument. It is difficult to see how this can be so in view of the operation of the power upon the existing rights of individuals; and to say that the residence of the alien, when invited and secured by treaties and laws, is held in subordination to the exertion against him, as an alien, of the absolute unqualified power asserted, is to import a condition not recognized by the fundamental law." (149 U. S. at 762.)*

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*Cf. Madison's Report on the Virginia Resolutions—1800, 4 Elliot Debates, 546, at 556 (1888):

> "But it cannot be a true inference that, because the admission of an alien is a favor, the favor may be revoked at pleasure. A grant of land to an individual may be of favor, not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away. To pardon a malefactor may be a favor, but the pardon is not, on that account, the less irrevocable."

We submit that the decisions in this Court go no further than to sustain the validity of an administrative proceeding against objections founded upon the Sixth Amendment and to establish that Congress has an independent power to legislate with respect to the conditions upon which aliens may remain within the United States. Whether the latter power is to be understood solely as a derivative of the power to impose conditions of entry, as is suggested in *Zakonaite* v. *Wolf*, 226 U. S. 272, 275, or as an aspect of a broader power to legislate "with respect to the conduct of an alien while resident here" (*Keller* v. *U. S.*, 213 U. S. 138, 144), does not appear to have been definitely settled by this Court. In either event, the decisions do not establish that the power of Congress to specify the "causes of deportation" (*Bilokumsky* v. *Tod*, 263 U. S. 149, 157) is unlimited by the substantive restrictions of the Bill of Rights. They could not establish such a doctrine for the obvious reason that the causes of deportation prescribed in legislation heretofore considered by this Court have all consisted of behavior which might reasonably be prohibited, assuming a power to legislate to exist.* But the mere existence of the power no more establishes the proposition that it is unlimited by the First Amendment than the existence of the power to regulate commerce implies that that power is not subject

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*Statements such as that in *Lapina* v. *Williams*, 232 U. S. 78, 88, that the "authority of Congress over the general subject-matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country"—must be read with this fact in mind. Compare the dictum by Mr. Justice Holmes in *Tiaco* v. *Forbes*, 228 U. S. 549, 556-7:

> "It is admitted that sovereign states have inherent power to deport aliens, and *seemingly* that Congress is not deprived of this power by the Constitution of the United States." (Italics ours.)

to the express limitations contained in the Constitution.* Indeed, the contention could not be supported without creating the incredible paradox that Congress has no power to take the property of a friendly alien without compensation (*Russian Volunteer Fleet* v. *U. S., supra*), but has the power to order a friendly alien deported if he fails to surrender gratuitously all his property to the United States. If, in that situation, the power to specify the causes of deportation would be held limited by the substantive provisions of the Fifth Amendment, no reason can be adduced for holding that it is unlimited by the First Amendment. Nor does a decision that the power to specify the causes of deportation is subject to limitations analogous to those imposed by the Constitution on

*The fatal weakness of such a position is well analysed in the dissenting opinion of Mr. Justice Brewer in *Fong Yue Ting* v. *U. S.*, 149 U. S. 698, 732, at 738:

> "Whatever may be true as to exclusion, and as to that see *Chinese Exclusion case*, 130 U. S. 581, and *Nishimura Ekiu* v. *United States*, 142 U. S. 651, I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens. What, it may be asked is the reason for any difference? The answer is obvious. The Constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions. And it may be that the national government, having full control of all matters relating to other nations, has the power to build, as it were, a Chinese wall around our borders and absolutely forbid aliens to enter. But the Constitution has potency everywhere within the limits of our territory, and the powers which the national government may exercise within such limits are those, and only those, given to it by that instrument. Now, the power to remove resident aliens is, confessedly, not expressed. Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and

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the other powers of Congress deny that in determining the scope of the limitation of the First Amendment, distinctions may validly be drawn between friendly and enemy aliens and between aliens with permanent and temporary residence. See the dissent of Mr. Justice Brewer in *Fong Yue Ting* v. *U. S.*, *supra*. Nor does it deny that even though aliens are protected by the First Amendment, the existence of an absolute power to *exclude* on any ground may justify admission on condition that the alien surrenders the constitutional rights he would otherwise acquire—although such a view might well contravene the decisions of this Court that unconstitutional conditions may not be imposed. *Western*

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restrictions imposed by the Constitution. In the case of *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 336, it was said: 'But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce; but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation.' And if that be true of the powers expressly granted, it must as certainly be true of those that are only granted by implication.

"When the first ten amendments were presented for adoption they were preceded by a preamble stating that the conventions of many States had at the time of their adopting the Constitution expressed a desire 'in order to prevent misconception or abuse of its powers, that further declaratory and restrictive clauses should be added.' It is worthy of notice that in them the word 'citizen' is not found. In some of them the descriptive word is 'people', but in the Fifth it is broader, and the word is 'person', and in the Sixth it is the 'accused', while in the Third, Seventh, and Eighth there is no limitation as to the beneficiaries suggested by any descriptive word."

Union Telegraph Co. v. *Kansas*, 216 U. S. 1; *Power Manufacturing Co.* v. *Saunders*, 274 U. S. 490; *Terral* v. *Burke Construction Co.*, 257 U. S. 529; *Frost* v. *Railroad Commission of California*, 271 U. S. 583; *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494; *United States* v. *Chicago M. & St. P. R. Co.*, 282 U. S. 311, 324; See *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 342.

The application of such a condition is impossible here, as the Government concedes (Government's Brief, p. 24 n. 2), since respondent entered legally long before the enactment of the statute in question or any similar statute and the legislation is not limited to aliens who entered after its enactment.* Qualifications and distinctions such as these are not material in the present case. As the Government's position is presented, it is enough to defeat the interpretation sought that the power to deport aliens is limited by the First Amendment. We submit that it is, for precisely the same reasons that the deportation process has been held by this Court to be subject to the procedural requirements of due process of law. *Kwock Jan Fat* v. *White*, 253 U. S. 454; *Japanese Immigrant Case*, 189 U. S. 86, 100-101; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106.

Third: Even if the power to deport is not limited by the First Amendment, we submit that the principles enunciated in that Amendment are of significance in interpreting the language of the statute. As Judge Anderson said in *Colyer* v. *Skeffington*, 265 Fed. 17, 60:

> "Statutory restrictions on immigration, like all other statutes are, if possible, to be construed in accordance with the spirit as well as within the letter of our Constitution, including the First Amendment and its declaration for freedom of speech, press, and assemblage."

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*Section 2 of the Act of October 16, 1918, c. 186, 40 Stat. 1012, 8 U. S. C. § 137 (g).

It should not be forgotten that the consequences of a statute prescribing the deportation of aliens on the ground in question here are not limited to the aliens deported. Such a statute operates to deprive citizens of their constitutional right to hear what the alien may have to say and to assemble in organizations with aliens as well as with other citizens. The statute is susceptible, without emasculation, of a construction which renders it consonant with the spirit of the First Amendment. Even if the inexorable command that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble" does not limit the power to deport, it is not lightly to be assumed that Congress accorded no significance to the principle of that command in enacting the legislation under consideration in this case.

For the foregoing reasons, we submit, that there is insufficient evidence to sustain the finding contained in the warrant of deportation that respondent, after entry, became a member of an organization that "believes in, advises, advocates or teaches * * * the overthrow by force or violence of the Government of the United States" within the meaning of the act of Congress.*

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*The Government's brief (pp. 48-49) cites twelve cases in support of the proposition that "comparable evidence has been held in numerous cases to support a finding by the Secretary that the Communist Party of the United States falls within the ambit of the statute". Of the twelve, in seven, the nature of the evidence introduced is in no way comparable. *Rex* v. *Buck*, [1932] 3 D. L. R. 97 (Ont. Ct. App.). *Skeffington* v. *Katzeff*, 277 F. 129 (C. C. A. 1, 1922). *Antolish* v. *Paul*, 283 F. 957 (C. C. A. 7, 1922). *U. S. ex rel. Abern* v. *Wallis*, 268 F. 413 [D. C., S. D. N. Y. 1920]. *Kjar* v. *Doak*, 61 F. (2d) 566 (C. C. A. 7, 1932). *Murdoch* v. *Clark*,

(*Footnote continued on next page.*)

II.

Section 2 of the Act of October 16, 1918, does not authorize the deportation of an alien for membership in an organization warranting exclusion under Section 1, where his membership occurred after entry, but terminated substantially before the institution of deportation proceedings.

Assuming, contrary to the fact, that the evidence suffices to sustain a finding that the Communist Party is an organization which believes in, advises, advocates or teaches the overthrow of the Government by force or violence, within the meaning of the statute, the order of deportation is nevertheless invalid because, as the Government concedes [Government's Brief, p. 8, n. 1], respondent had ceased to be a member of the organization six months before the

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(*Footnote continued from previous page.*)

53 F. (2d) 155 (C. C. A. 1, 1931). *In re Saderquist*, 11 F. Supp. 525 (D. C. Me. S. D. 1935), aff'd. 83 F. (2d) 890 (C. C. A. 1, 1936). In two, the court does not set forth or discuss the evidence as to the character of the organizations involved. *Wolck* v. *Weedin*, 58 F. (2d) 928 (C. C. A. 9, 1932). *Re Worozext*, 58 Can. Cr. Cas. 161 (Sup. Ct. Nova Scotia 1932). In the remaining three, the nature of the evidence introduced, and the context and setting of the scanty excerpts quoted, are too insufficiently portrayed to permit a comparison. *Kenmotsu* v. *Nagle*, 44 F. (2d) 953 (C. C. A. 9, 1930). *Ex parte Vilarino*, 50 F. (2d) 582 (C. C. A. 9, 1931). *Branch v. Cahill*, 88 F. (2d) 545 (C. C. A. 9, 1937).

The additional cases cited by the Government [p. 49, ftn. 15], as holding "that even in the absence of evidence as to the aims and objectives of the Communist Party of the United States, proof of membership in that Party is alone sufficient to support deportation", need not be considered as the Government does not attempt to sustain such a position. Insofar as these cited cases support or suggest the validity of such a view they are, for reasons heretofore stated, untenable.

institution of deportation proceedings against him. Section 2 of the Act of 1918 provides for the deportation of "any alien who, *at any time* after entering the United States, is found to have been at the time of entry, *or to have become thereafter*, a member of any one of the classes of aliens enumerated in Section 1 of this Act". The relevant provision of Section 1 is—"(c) Aliens who believe in, advise, advocate, or teach, or who *are* members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States . . :". The Government argues, relying upon the opinion of Judge Chase and Judge Manton in *U. S. ex rel. Yokinen* v. *Commissioner of Immigration*, 57 F. (2d) 707, that this statutory language plainly covers any alien who, after entry, becomes a member of an organization, membership in which, at the time of entry, would have warranted his exclusion, even though he was not so at the time of arrest or at the time the warrant of deportation issued.* We submit that the language requires no such interpretation—that on the contrary when Section 2 and Section 1 are read together, the language points to the opposite conclusion and that this interpretation is shown to be correct by a consideration of the legislative history of the statute, of its other significant provisions, and of the theory upon which deportation rests.

First: As a matter of grammar and rhetoric, it seems clear that the phrase "*at any time*" in Section 2 modifies

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*Judge Augustus Hand concurred in the result on another ground, finding it "unnecessary in this case to determine whether former membership in a proscribed organization is sufficient to justify the deportation of an alien who has been expelled for failing to conform to its principles". [57 F. (2d) 707, 708.] In the District Court Judge Mack had also found it unnecessary to decide the question (Record, p. 57).

the participle "found" and not the subsequent infinitive phrase "to have become thereafter". Accordingly, the presence of the words "at any time" is without significance in the present context. The Government must therefore contend that the words "to have become thereafter" unambiguously indicate that the membership to which the statute refers need only have occurred at some time after entry and may have terminated at any time no matter how long prior to the institution of deportation proceedings. But this contention overlooks the vital fact that in defining the excluded class in Section 1, Congress spoke in the present tense of aliens who *"are"* members. It was necessary in Section 2 to use the past infinitive "to have been" in referring to aliens who were members at the time of entry, and it was obviously grammatically convenient to adhere to the past infinitive in referring to aliens who were not members at the time of entry but became members thereafter*. Otherwise the statutory language would have had to be: "any alien, who, at any time after entering the United States is found to have been at the time of entry, or to be thereafter", a formulation which would not have distinguished as sharply as the present language does between membership existing at the time of entry and membership occurring subsequently, and which in any event would not have avoided the argument made by the Government here.

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*Elsewhere in the statute Congress, for reasons of grammatical convenience, employed a verb in the past tense, but obviously with a present meaning, immediately after another verb properly in the past tense. See Section 19 of the Act of 1917: "Any person who shall be arrested . . . on the ground that he *has entered* or *been found* in the United States in violation of any other law thereof . . . shall be deported"; and compare the language appearing previously in the same section: "Any alien who shall *have* entered or who shall *be* found in the United States in violation of this act, or in violation of any other law of the United States . . .".

In thus succumbing to grammatical temptation, Congress concededly produced an awkward locution: aliens who are found *to have become* members of a class consisting of aliens who *are* members of a designated organization. The awkwardness of the locution does not deprive the present tense in the final clause of its governing significance. The Government's argument requires a reading of Section 1, which deprives the double nominative "aliens who are members" of all significance and reduces the combined clauses to "aliens who are found to have become members". Had the statute read expressly "any alien who is found after entry to have become a person who believes in" the designated doctrine or "who belongs to or is affiliated with" the designated organizations, the contention would be obviously untenable, yet that, we submit, is precisely what the statute says if the double nominative in Section 1 (c) is not ignored. The more plausible interpretation of Section 2 perceives in the use of the past infinitive no more than a recognition that the act of becoming was one to take place subsequent to the entry and necessarily prior to the finding, and deduces an intent to go no further than to render aliens deportable for causes which would have warranted exclusion had they existed at the time of entry. But Section 1 does not provide for the exclusion of aliens who *formerly*, but not at the time of entry, held the designated beliefs or were members of the designated organizations; it ignores the past and deals with the present.

That this analysis is correct seems clear when the problem is considered in the perspective achieved by examination of other provisions in the statute. Thus, Section 19 of the Act of 1917 [39 Stat. 874], in specifying the causes of deportation of aliens who entered lawfully, is concerned with conditions existing at the time of the proceedings in every case but one—conviction in this country of a crime involving moral turpitude; and in that case a time limit

is provided for a first offense and the statute is in any event rendered inapplicable by express language to an alien who has been pardoned or who the sentencing judge recommends should not be deported. It is hardly to be supposed, for example, that the reference to "any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing" was intended to authorize the deportation within the five-year period of a prosperous alien in no danger of becoming a public charge, merely because at some earlier time in the five-year period when the Secretary had failed to act, the alien had become a public charge for a short time. Yet, had Congress said, as it easily might have said, "any alien who within five years after entry is found to have become a public charge", etc., the Government's argument in this case would be strictly applicable there. Indeed, Congress seems to have experienced no difficulty in unambiguously according significance to past conditions when it intended to do so, as in the case of conviction of crime referred to*above* and in the provision of Section 3 of the Act of 1917 excluding "all idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at *any time previously*". There is therefore no justification for the statement in the majority opinion in the *Yoknen* case, *supra*, which the Government advances here, that the language plainly authorizes the deportation of an alien for former membership in an organization, present membership in which would have warranted his exclusion under Section 1; if any reading can be said to be plain, it is that past membership no more suffices for deportation than it would have sufficed for exclusion.

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*Compare the reference in Section 3 of the 1917 Act to the exclusion of "persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude".

Second: The legislative history of the statutory provisions in question gives clear confirmation to the view that in using the phrase "to have become", Congress did not intend to make former membership after entry sufficient to warrant deportation.

By the Act of 1903 [32 Stat. 1214], Congress provided for the exclusion of "persons who believe in or advocate the overthrow by force or violence of the Government of the United States" (Section 2), and in addition any "person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government" (Section 38). The only provision in the statute for the *deportation* of such persons applied to aliens who entered in violation of the statute and who were proceeded against within a designated time. These provisions were re-enacted in the same form by the Act of February 20, 1907 [34 Stat. 898].

The first provision for the deportation of such persons who *entered lawfully* was made in H. R. 6060, enacted by the 63rd Congress but vetoed by President Wilson in a message dated January 28, 1915 [House Document, 63rd Cong., 3rd. Sess., Vol. 6889, No. 1527]. In addition to the exclusion provision of the earlier acts, this bill provided that "any alien who within five years after entry shall be found advocating or teaching" the specified doctrines shall be deported. It also reformulated the provision for deportation of aliens who *entered* illegally, providing "that at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law" shall be deported. Substantially the same measure was introduced in the 64th Congress [H. R. 10384] and enacted February 5, 1917 over the Presidential Veto [39 Stat. 874]. During the course of the passage of this bill in the House, Mr. Burnett, the Chairman of the Committee on Immigration in charge of the

bill, moved on behalf of the Committee to amend Section 19 by inserting the phrase "at any time" so as to read, as Section 19 of the Act finally came to read, that "any alien who at any time after entry shall be found advocating or teaching" the specified doctrines shall be deported. The purpose of the amendment was to make clear that there was to be no time limitation on deportation of aliens found advocating the designated doctrines.*

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*In moving this amendment, Mr. Burnett said:

> "That will provide that those who are here, advocating or teaching the unlawful destruction of property at any time, shall be deported, so that there will be no question of a time limit.
>
> "Mr. Stafford. I should like to inquire of the chairman of the committee whether that would apply to an alien who had developed the practice or idea of advocating the unlawful destruction of property since he came to this country?
>
> "Mr. Burnett. Yes; if he advocates or teaches it. The purpose of it is so that there shall not be any time limit to the deportation of those who teach anarchy after they come over here.
>
> "Mr. Burnett. The only change made in this bill from the bill that was vetoed is that we do not want a time limit of five years to apply to it. Some of the excluded classes have a time limit of five years, and after five years they are not deportable; but those who teach anarchy or the destruction of property ought not to fall within that time limit." [53 Cong. Rec., pt. 5, p. 5165, 64th Cong., 1st Sess., March 30, 1916.]

See also Sen. Rep. No. 352, p. 14, 64th Cong., 1st Sess., Vol. 6898, accompanying H. R. 10384:

> "To the fullest extent practicable this section [i. e., Section 19] has been made to include all of the classes subject to deportation after having entered the country; this is accomplished in two ways, first, by enumerating the classes and indicating the period, where any is set, within which deportation must be effected, and second * * *."

The 1917 statute was amended by the Act of October 16, 1918, which dealt solely with what the title of the Act referred to as "aliens who *are* members of the anarchistic and similar classes" [40 Stat. 1012].* Section 1 expanded somewhat the categories of aliens excluded on this ground, for the first time specifically including "aliens who are members of or affiliated with any organization that entertains a belief in, teaches or advocates the overthrow by force or violence of the Government of the United States".** Section 2 of the Act dealing with deportation modified Section 19 of the 1917 statute with respect both to substance and to form. With respect to substance, the statute retained the provision for the deportation of aliens who at the time of entry were members of one of the excluded classes, but eliminated therefrom the five-year period of limitation contained in Section 19. Moreover, the provision of Section 19 for the deportation of aliens of what the statutory title denominated the "anarchistic and similar classes" was significantly expanded. Whereas the Act of 1917 referred only to "any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law, or the assassination of public officials", the Act of 1918 broadened the causes of deportation so as to include all the causes of exclusion specified in Section 1, which themselves expanded, as we have said, the causes of exclusion

*The full title was: "An Act to exclude and expel from the United States aliens who are members of the anarchistic and similar classes". That the title of a statute is of significance in its interpretation, see *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 462:

**This section was subsequently amended by the Act of June 5, 1920 [41 Stat. 1008] in a manner which does not substantially affect the present case.

provided by the 1917 Act. Accordingly, while there was no provision in the 1917 Act for the deportation of aliens who did not personally advocate the specified doctrine but were members of organizations that did, the 1918 Act contained such a provision. So far as the Committee reports show, this change, coupled with the elimination of the time limitation referred to above, and two other changes not material here* was the sole purpose of the 1918 statute [House Rep. 645, 65th Cong., 2nd Sess., accompanying H. R. 12402; Senate Rep. 65th Cong., 2nd Sess. No. 648]. Nothing in these substantive modifications or in the purpose behind them supports the Government's argument that Section 2 was intended to make former membership enough.

But in addition to these substantive changes, the Act of 1918 made a *formal* change. Whereas Section 19 of the 1917 statute separated into *distinct clauses* the provision for the deportation of an alien "who at the time of entry was a member of the classes excluded by law" and that applying to an alien "who at any time after entry shall be found advocating or teaching" the specified doctrine, Section 2 of the 1918 Act combined the provisions concerning the two groups and dealt with them in a single sentence unbroken by semi-colons. It is upon the locution thus engendered and what the Government contends to be its grammatical implications, that the entire argument rests. But it is hardly to be supposed that so momentous a consequence was intended to flow from this formal modification without some affirmative evidence to that effect, and no such evidence exists.

The Government states [Government's Brief, p. 19] that it has been the long continued administrative practice of the Department of Labor to apply Section 2 of the Act

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*One made it a felony for those deported under the Act to return; the other removed certain clauses that seemingly, under the Act of 1917, qualified the term "anarchists."

of 1918 to cases of past membership. The private bill of July 5, 1937, referred to by the Government, gives no support to this suggestion. The Congressional amnesty may very well rest on the view that the statute was misapplied and, in view of the decision in the *Yokinen* case, *supra*, difficult to rectify in the lower Courts and impossible here until some conflict induced this Court to review the question.* No other evidence of departmental practice is adduced. On the contrary, both the Department of Justice and the Department of Labor seem to have taken the view as early as 1920 that the membership provisions of the statute are concerned with present membership. Thus, the analysis of the 1918 Act by the Department of Justice in a memorandum to its special agents dated August 12, 1919 refers only to "those who *are* members" [H. R. Rep., 66th Cong., 2nd Sess., No. 504, p. 9], and a communication of the Assistant Secretary of Labor to the Commissioner General of Immigration, dated April 6, 1920, specifically states: "When membership has been withdrawn under circumstances satisfactorily establishing good faith the accused alien does not come within the proscriptions of the Act of October 16, 1918, as to membership." [Hearings, Communist and Anarchist Deportation Cases, H. R. 66th Cong., 2nd Sess., Sub-Committee on the Committee on Immigration and Naturalization, April 21st to 24th, 1920, p. 17.] These rulings preceded the enactment of the amendatory Act of June 5, 1920 [41 Stat. 1008-1009] in which the provision in question was left unchanged.

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*It is significant that in the letter of the Secretary of Labor, which is a part of Senate Report No. 769, to accompany H. R. 1731, 75th Congress, First Session (referred to in the Government's Brief, p. 19), the Department's decision to direct deportation in the particular case is explicitly stated to be based upon prior judicial decisions and no reference is made to any administrative construction reaching the same result as the *Yokinen* case, *supra*.

Third: What the language of the statute and its legislative history teach is forcefully confirmed by a consideration of the ends to be achieved by deportation and the theory upon which the deportation process rests. After bitter division on the question [see *Fong Yue Ting* v. *United States,* 149 U. S. 698], it has been authoritatively established by this Court that the deportation laws are not criminal laws.* *Fong Yue Ting* v. *United States, supra; Wong Wing* v. *United States,* 163 U. S. 228; *Bugajewitz* v. *United States,* 228 U. S. 585; *Bilokumsky* v. *Tod,* 263 U. S. 149; *Mahler* v. *Eby,* 264 U. S. 32. Accordingly, unlike penal laws, the primary purpose of which is to deter the commission of criminal acts [see *Hopt* v. *Utah,* 110 U. S. 574, 579; *Huntington* v. *Atrill,* 146 U. S. 657; *Pennsylvania* v. *Ashe,* 302 U. S. 51; cf. *McBoyle* v. *United States,* 283 U. S. 25; *Westfall* v. *United States,* 274 U. S. 256; *United States* v. *Alford,* 274 U. S. 264; *Gompers* v. *Buck Stove & Range Co.,* 221 U. S. 418, 441], the deportation laws are addressed to the elimination from the United States of individuals whose continued residence Congress has determined to be dangerous. [See *e. g., Mahler* v. *Eby,* 264 U. S. 32, 39.]** It is therefore in a sense inappropriate to designate a cause of deportation as a "deportable offense",

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*The issue was one which had been agitated ever since the Alien and Sedition Laws. See *e. g.,* Madison's Report on the Virginia Resolutions [1800], 4 Elliott Debates [1888] 546 at 554-5; see also the dissenting opinion of Mr. Justice Brewer in *Fong Yue Ting* v. *United States,* 149 U. S. 698, 732, 740-741.

**The opinion of the Court by Chief Justice Taft speaks as follows: "It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment . . . Congress by the Act of 1920 was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the existence of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society."

as the majority opinion in the *Yokinen* case does [57 F. (2d) 707, 708]. An analogy more perfect than one drawn from the criminal law is provided by the common legal provision for the commitment of the insane, which has for its purpose the incapacitation of individuals because they are dangerous and so long as they continue to be. [See *Sinclair* v. *State*, 161 Miss. 142, especially the concurring opinion of Ethridge, J.] Indeed, if this view of the deportation process were not the only tenable one, if the purpose of the deportation laws were to provide an additional deterrent from the commission of undesirable acts, it is difficult to see upon what theory the decisions sustaining the administrative procedure [*e. g., Fong Yue Ting* v. *United States, supra*], sanctioning a retroactive application [*Bugajewitz* v. *United States, supra; Mahler* v. *Eby, supra*], and permitting an adverse inference from silence [*Bilokumsky* v. *Tod, supra*] could have been reached or could now be sustained.

If the dominant end of the deportation laws is to identify dangerous individuals and provide for their expulsion from the country, the unreasonableness of the interpretation which the Government seeks to place upon the language of the statute is made strikingly clear. For it is inconceivable that Congress intended to provide that an alien who, many years ago, was for a short time a member of an organization specified by the statute, but ceased to be such a member a long time ago, is an individual of such dangerous potentialities that his removal from the country is necessitated in the public interest. Indeed, the Government's interpretation, if accepted, cannot be limited to past membership; it must apply also to past belief. The consequence, therefore, would be to attribute to the Congress a solemn finding that any alien who, at any time after entry, has believed in the overthrow of the Government of the United States, represents a danger to established American institutions, no matter how short the period for

which the belief was held or how long ago the belief was supplanted by a passionate devotion to the Constitution of the United States. Such an interpretation would not further the purpose of the statute to protect the United States against dangerous individuals, but would pervert the fundamental theory upon which deportation rests. Moreover, even if the incidental effect of the statute on the behavior of the alien population is to be considered, an interpretation to apply to past membership would not tend to reduce the number of individual aliens embracing dangerous views, but would have precisely the opposite effect, for there would be no incentive to abandon views once held. Such an interpretation would not only deny a *locus poenitentiae,* but it would tend to cut off aliens, once persuaded to join a proscribed organization, from exposing themselves to the persuasive effect of education and contrary argument in the course of the play of the democratic process, since their initial decision would forever damn them to deportation. All statutes should be interpreted in the light of and in furtherance of their purposes, and especially is that the case where an interpretation subservient to the purpose will result in ameliorating the rigor of a law which carries a heavy burden of "possible human woe". [Hough, J., in *United States ex rel. Karamian* v. *Curran*, 16 F. (2d) 958, 961.]*

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*An additional reason for such interpretation is the fact that, as the Circuit Court of Appeals for the Sixth Circuit pointed out in *Browne* v. *Zurbrick*, 45 F. (2d) 931, 932, by "the Act of March 4, 1929, § 1 (a-c), as amended by Act June 24, 1929 (8 U. S. C. A. § 180), the alien is forever barred from re-entry, even if after arrest he is allowed to and does go out voluntarily. Not only that, but if he returns he is to be imprisoned as a felon. Thus, deportation becomes as to aliens who have established a domicile here a decree of perpetual punishment—regardless of fixed family and business ties and connections . . .".

III.

The question of the sufficiency of the evidence to sustain the finding in the warrant of deportation that respondent personally "believes in and teaches" the violent overthrow of the Government of the United States, is not before this Court. In any event, the Circuit Court of Appeals correctly held that the evidence is insufficient.

First: Although the question of the sufficiency of the evidence to support the finding in the warrant with respect to respondent's personal belief was decided against the petitioner by the Circuit Court of Appeals, it was not presented by the petition for certiorari nor included in the specification of errors to be urged (see pp. 10-11, *supra*). There is nothing to indicate that the question was decided by the District Court in dismissing the writ of habeas corpus (R. 65), nor was it necessary to consider the question if that Court regarded the evidence as sufficient to sustain the finding with respect to membership. The Government's brief concedes that the question does not present an issue "calling for review by this Court" (Government's Brief, p. 50). Without urging that the question *ought to be* considered, it is nevertheless submitted "for consideration", with the suggestion that this Court has the power to consider it, if it desire to do so. Neither the cases cited by the Government (Brief, p. 50) nor any decision that we have been able to find affirms the existence of a power to reverse the judgment below at the behest of the *petitioner*, as distinguished from the *respondent**, on a ground not assigned in the petition or in the respondent's statement and not involving a question of jurisdiction or an event occurring after the issuance of the writ of cer-

*See *Langnes* v. *Green*, 282 U. S. 531, 538 (1931).

tiorari*. But conceding that the power exists**, the decisions clearly indicate a disposition against its exercise, for in all the decisions cited by the Government, as well as those that counsel for respondent have been able to find, a request to consider such a question has been summarily refused***. Indeed, were a practice to be adopted in favor of consideration of such questions in cases like this, it would render largely nugatory the scrupulous limitations

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*See *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9 (1918).

**See *Washington Coach Co.* v. *N. L. R. B.*, 301 U. S. 142, 146 (1937); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178 (1938); compare *Olmstead* v. *United States*, 277 U. S. 438 (1928).

***Connecticut Ry. & Lighting Co.* v. *Palmer*, No. 63, 59 Sup. Ct. 316, 320, 324 (Jan. 3, 1939); *Steele* v. *Drummond*, 275 U. S. 199, 203 (1927); *Gunning* v. *Cooley*, 281 U. S. 90, 98 (1930); *Webster Electric Co.* v. *Splitdorf Electric Co.*, 264 U. S. 463, 464 (1924); *Olson* v. *United States*, 292 U. S. 246, 262 (1934); *General Talking Pictures Corp.* v. *Western Electric Co., supra*, n.**; *Washington Coach Co.* v. *N. L. R. B., supra*, n. **; *cf. Johnstown* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494 (1933); see *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242 (1918); *Helvering* v. *Taylor*, 293 U. S. 507, 511 (1935); *Prudence Co.* v. *Fidelity & Deposit Co. of Maryland*, 297 U. S. 198, 208 (1936); *Morehead* v. *N. Y. ex rel. Tipaldo*, 298 U. S. 587, 604 (1936); *Crown Cork & Seal Co.* v. *Gutmann*, 304 U. S. 159, 161 (1938). Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1936) § 389.

It is of no significance in this respect that the judgment of the Circuit Court of Appeals, of which the petitioner complains, is one reversing the judgment of the District Court. *Steele* v. *Drummond, supra; Webster Electric Co.* v. *Splitdorf Electric Co., supra; cf. Johnstown* v. *Manhattan Ry. Co., supra;* see *Helvering* v. *Taylor, supra; Prudence Co.* v. *Fidelity & Deposit Co. of Maryland, supra; Morehead* v. *N. Y. ex rel. Tipaldo, supra.*

on review by certiorari imposed by this Court in the exercise of a wise self-restraint. The practice to be observed was referred to in an opinion by Mr. Justice Reed as recently as January 3, 1939. *Connecticut Railway & Light Co.* v. *Palmer*, No. 63, 59 Sup. Ct. 316, 320, 324.

Second: In any event, the Circuit Court of Appeals correctly held that there is insufficient evidence to sustain the finding in the warrant of deportation that respondent "believes in and teaches the overthrow by force and violence of the Government of the United States". A review of all of the relevant evidence shows its insufficiency more clearly than the selective process employed in discussing the evidence in the Government's brief. The testimony of the witness Levering (R. 17-27), a former prostitute unable to read or write (R. 20, 32), who had ceased to be the respondent's mistress a year before the deportation proceedings (R. 24, 41), was patently without significance. Her statement that respondent, whom she knew to have been "for Smith" for President in 1928 (R. 25), was claimed by a "good many people" (R. 23)—only two of whom she could name—to "believe in Communism" or "to be a Communist", goes no further than to exemplify what the Court below aptly designated as "the tyranny of labels over certain types of mind". A number of character witnesses from the community testified to respondent's good reputation, and that in their frequent associations with him they had never heard him advocate or express opposition to government (R. 28, 49, 51, 52-3, 60-3). The testimony at the prior naturalization hearing of the officer Brown, the record of which was introduced at the deportation hearings (R. 19), that when respondent was arrested at his restaurant for violation of the National Prohibition Act he said "to hell with the Government of the United States and everybody connected with it", hardly sustains the inference that he was devoted to the cause of

violent revolution. Accordingly, if the finding is to be sustained, it must rest solely upon the respondent's own testimony.

At the first deportation hearing, respondent testified that he had read "No. 1 and No. 2 books" of Karl Marx; that he did not know whether they had a title; that he had bought them in 1920 for $7.50 and sold them six months later at a profit; that Marx "was opposed to the owning of property" but that respondent did not accept his teaching because "there was too much prosperity here at that time" (R. 11); that he did not "know exactly" what the Communist Party stood for at the time he joined it; that he believed in the ownership of property by individuals; that he did not believe in the overthrow of the Government of the United States and the establishment of a workingmen's government "from a Communist standpoint"; that he did not distribute or cause to be distributed "anarchistic literature"; that he received the "Daily Worker" for a short time, it having been sent to him by a former roomer in lieu of $10 back rent; that his belief "in the way of government" was that "it is best like we have here. We have a good Constitution for the people, by the people. We have a lot of grafters, as you know, that should be gotten rid of." (R. 13) He further testified on examination by his own attorney that he discontinued his membership in the Communist Party because he "didn't like it"; that he had never seen or had in his possession at any time any literature "that advocated or taught the killing of United States Government officials or the officials of any other organized government"; that he did not believe in the killing of United States Government officials simply because they are United States Government officials; that he did not believe in sabotage or the unlawful destruction of property (R. 16); that when he joined the Communist Party he did so "to find out what it meant"; that "merely speculating", he had bought some Soviet Russian bonds which

"paid good dividends", because he wanted to invest his money and make a profit (R. 17).

At the second deportation hearing, respondent testified further that he had never considered himself "as a Communist"; that he did not now consider himself one (R. 55); that "we should not organize against the Government is my belief"; that he did not think "that capitalist(s) work against working class of people"; that he did not advocate "the working class of people using guns or other destructive means to overthrow our Government or any other government"; that he did not believe or advocate "that government is killing us"; that he did not believe in the overthrow of government; that he was not interested in efforts to stop the transportation of weapons to China or "anything like that"; that he was "satisfied with working conditions in America"; that his idea about the proper means to employ to make changes in the Government is by "voting and elections of good officials". In response to the question whether respondent considered himself "a working man or a capitalist", he answered: "As I understand it, when you have a few dollars you are considered a capitalist and as I have a few dollars and am also a working man, I would think I am both".

Nothing in respondent's testimony at either of these hearings permits any other conclusion than that respondent is shown, as the Court below said, to be "a small bourgeoisie, a merchant, with a little capital, some canniness, a fair amount of human kindness, some bad habits, and apparently no quarrel with the Government of the United States, but only with what he regards as the evils of Capitalism as such, and with grafters holding Government offices" (R. 72).

At the hearing on petitioner's application for naturalization, the record of which was introduced in the deportation proceeding (R. 38-44), petitioner acknowledged that he had joined the Communist Party and paid a lump sum

of forty cents in membership dues (R. 42); that he had bought Soviet bonds for his "own protection" (R. 43); that he "may have handed somebody" some "Communistic literature" but was "unable to recall just who it was"; and that he had received the "Daily Worker" as stated above. He also testified that he made no further payment to the Communist Party; that he was not "a Communist at heart"; that he did not consider himself "a Communist" because he was not paying dues to the Communist Party; that he did not know "whether we shall ever have a Communistic system in the United States"; that he had read Marx's books and "Marx states that sooner or later there will be a Red Government in every country in the world"; that if "Communism comes in this country I will not be against it, because I have got to go with the people, and whatever the people want I will have to go along with them". Needless to say, these statements provided no basis for the finding in the warrant of deportation.

The Government points to the transcript of respondent's statements at a preliminary inquiry before an immigration inspector subsequent to the naturalization hearing and prior to the issuance of the warrant of arrest (R. 30-34). Respondent testified in the deportation proceedings that this transcript was inaccurate; that the "answers as transcribed were not as given by me. They never put my answers in as I told him, and I could not stop him. I was excited and intimidated. He looked at me hard and hammered on the desk. He was mad and made me mad." (R. 10, 6) But even if the transcript—which rests upon the verification of an immigration inspector who testified at the hearing, on the return of the writ of habeas corpus, "that he might have edited the alien's statements to correct the grammar, transposition, or something of that sort", "that he did not advise the alien of his right to counsel" and that "there was no warrant of arrest" but that "he and the policeman carried the alien with his consent to

the jail" (R. 6-7)—is to be taken as correct, nothing in the statement as reported sustains the finding. Respondent's testimony was that he was familiar with the intents and purposes of the Communist Party at the time of his initiation; that he acquired a prior knowledge of Communism from a study for about ten years of the writings of Marx; that he was "in accord with Marx in regard to the social order of things" (R. 32); that the Communist Party proposes to destroy capitalism and establish a government by the people similar to that now in existence in Russia; that he did not know what means the Communist Party will use to attain its purpose; that its leaders say that it will resort to armed force in the event that should be necessary; that "the destruction of Capitalism is inevitable" and "the sooner it comes the better off we shall all be"; that he would not personally bear arms against the present United States Government at this time because Communism is not strong enough now; that he had handed out some papers obtained from the headquarters in Kansas City, which consisted of something calling upon the people to unite against Capitalism; that Capitalism and the present Government of the United States are "all the same thing". Quite apart from the striking differences between these statements and respondent's earlier testimony in the naturalization hearing, as well as his later testimony in the deportation proceedings, a discrepancy which suggests interesting implications in the immigrant inspector's admission that he had edited the transcript, it is to be observed that this language contains no affirmative statement that respondent would be prepared to take up arms against the Government of the United States at any time. Accordingly, the inspector seems to have put a further question, which the Court below properly denominated as "foolish" and which the respondent answered, as the Court below said "foolishly, according to its folly". The question was: "Supposing that the majority of the populace of the United

States were Communists, and were certain of a victory over Capitalism in an armed conflict, would you then personally bear arms against the present Government?" Respondent answered: "Certainly; I would be a fool to get myself killed fighting for Capitalism." Inasmuch as, if the condition presupposed in the question were ever to come about, the necessity for an armed conflict between "the majority of the populace of the United States" and "Capitalism" could only arise if the will of the people were thwarted by undemocratic resistance, and inasmuch as respondent obviously interpreted the question further to presuppose the existence of an armed conflict, the folly of the question is evident and the foolishness of any answer inevitable. Nevertheless, the Assistant to the Secretary found* that the evidence indicated that respondent not merely "believes in" but also "teaches the overthrow by force and violence of the Government of the United States". There is absolutely no evidence that respondent in any

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*The record does not contain an examiner's summary of recommendation following the second deportation hearing. The summary of the first hearing at which respondent's prior statements were incorporated in the record is as follows:

> "From the evidence adduced at this hearing, it appears that Joseph Strecker first entered the United States November 7, 1912, at New York, N. Y., ex S.S. 'Bremen' and has remained in the United States since that time. It appears that about November 3, 1932, he became a member of the Communist Party, and accepted certain Communistic literature for distribution, at that time. His membership book is incorporated in the evidence, but not the circular that he caused to be distributed. On two former occasions he admitted to Government officers that he was a Communist, and believes in the Communist doctrines. At this hearing he admits that he has been a Communist, but denies being in or belonging to the order at the present time. It is believed that the charges in the warrant of arrest have been sustained by the evidence."

relevant sense "teaches" anything, and we submit that the evidence with respect to respondent's personal belief was not, in the language of the Chief Justice in *Consolidated Edison Co.* v. *National Labor Relations Board*, 59 Sup. Ct. 206, 217, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that respondent believes in the violent overthrow of the Government of the United States.

Third: Assuming, *arguendo*, that the evidence sufficed to sustain a finding that respondent "believes" in the overthrow of the United States Government by force at some remote and hypothetical time, the evidence would nevertheless be insufficient under the statute properly construed. Applying the rule of *ejusdem generis* (*United States* v. *Bitty*, 208 U. S. 393, 402; *Hansen* v. *Haff*, 291 U. S. 559, 562; *United States* v. *Salen*, 235 U. S. 237, 249) we submit that the belief to which the statute refers, along with advice, teaching and advocacy, is not belief which is expressed only in response to questions at an official inquiry at which an adverse interest may be drawn from silence (*Bilokumsky* v. *Tod*, 263 U. S. 149; but *cf. U. S. ex rel. Kettunen* v. *Reimer*, 79 F. [2d] 315, 317 [C. C. A. 2nd]). But this conclusion is necessitated by considerations even more forceful than the rule of *ejusdem generis*. As we have previously urged (pp. 49-56, *supra*), the power of Congress to deport aliens is limited by the guarantees of individual freedom contained in the First Amendment, and this limitation would preclude respondent's deportation even if he had advocated that the beliefs which the Government attributes to him should be practiced. The limitation is the more strikingly applicable where the cause advanced for deportation is not advice, teaching or advocacy, but personal belief alone. For what this Court has said of freedom of speech is even more clearly applicable to "freedom of thought", "that it is the matrix, the indispensable condition, of nearly every other form of freedom", and that with "rare aberrations

a pervasive recognition of that truth can be traced in our history, political and legal." *Palko* v. *Connecticut*, 302 U. S. 319, 327. Indeed, inasmuch as the finding in the warrant of deportation recites that respondent "believes in and teaches" the specified doctrine and no effort has thus far been made by the Government to rely upon respondent's belief alone, we submit that if the statute were to be construed to apply solely to belief, the Constitutional question raised by such an interpretation at this juncture would be open in this Court, and the statute thus construed, would be invalid under the First Amendment and under the due process clause of the Fifth Amendment as well*. Compare *Missouri* v. *Gehner*, 281 U. S. 313; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673; see *Wiborg* v. *United States*, 163 U. S. 632, 658-660; *Clyatt* v. *United States*, 197 U. S. 207, 221-222.

CONCLUSION.

The Government also contends that the Circuit Court of Appeals erred in amending its order of reversal to provide for a trial *de novo*, as suggested by the Circuit Court of Appeals for the Ninth Circuit in *Ex parte Fierstein*, 41 F. (2d) 53. See also *Whitfield* v. *Hanges*, 222 Fed. 745 (C. C. A. 8th); *Ng Fung Ho* v. *White*, 259 U. S. 276. In what situations a trial *de novo* may be appropriate in a District Court and may be ordered by the Circuit Court in the exercise of its duty under Rev. Stat. § 761 (28 U. S. C., § 461) to "dispose of the party as law and justice require" (compare *Mahler* v. *Eby*, 264 U. S. 32, 46), it

*It is to be observed in this connection that as one of the grounds of invalidity of the warrant of deportation, the petition for habeas corpus alleges generally that petitioner "has been denied due process of law".

is unnecessary in the present case to decide. Since the warrant of deportation was void for the reasons assigned by the Circuit Court of Appeals and the additional reasons set forth above, there was no occasion for any further proceedings and respondent was entitled to be discharged.

For the foregoing reasons, respondent prays that the amended judgment of the Circuit Court of Appeals be modified to direct that the writ of habeas corpus be sustained and the respondent discharged with cancellation of his bail.

Respectfully submitted,

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